TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 739.

E. H. EMERY & COMPANY, APPELLANT,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED OCTOBER 12, 1917.

(26,206)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1917.

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a Pleas and Proceedings Before Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa, Wherein E. H. Emery & Company is Appellant and American Refrigerator Transit Company is Appellee.

Chester W. Whitmore, Ottumwa, Iowa, Attorney for Appellant.
McNett & McNett, Ottumwa, Iowa; Brammer, Lehmann & Seevers, Des Moines, Iowa, Attorneys for Appellee.
Wm. C. McArthur, Clerk, P. O. Des Moines, Iowa.

b Filed September 18th, 1917. Wm. C. McArthur, Clerk, By Louis J. Adelman, Deputy.

Document No. 5.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to American Refrigerator Transit Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States in and for the Southern District of Iowa, Ottumwa division, and filed in the clerk's office, on the 17 day of September A. D. 1917, in a cause wherein E. H. Emery & Company are appellants, and you are appellee, being number thirty on the law docket of said court, to show cause, if any, why the order and judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin J. Wade, District Judge of the United States, this 17 day of September, A. D. 1917.

MARTIN J. WADE,
District Judge of the United States.

Service of a copy of the within citation is hereby admitted, this 17th day of September A. D. 1917.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for said Appellee the American Refrigerator Transit Company.

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Document No. 1.

Defendant's Acceptance of Service of Notice of Plaintiff's Election to Stand on Motion to Remand, etc.

Filed May 31st, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY.

Defendant's Acceptance of Service of Notice of Plaintiff's Election to Stand on Motion to Remand, etc.

Service of the within notice accepted and copy of same received this twenty-ninth day of May, 1917, together with copy of said Bill of Exceptions, Exhibit "A"; and copy of statement of appeal by plaintiff, and copy of proposed judgment entry, and appeal bond, and citation on behalf of said American Refrigerator Transit Company, defendant, service upon it of citation upon such appeal being hereby waived by it.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for American Refrigerator Transit Company.

Copy of the within proposed record of 102 pages received this 14th day of July 1917, with notice under rule 8 of the Supreme Court of the United States that, upon allowance and signing by the

trial judge, it, is the portion of the record to be incorporated into the transcript of record to be filed with said Supreme Court.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for American Refrigerator Transit Company.

(Endorsed:) Filed May 31, 1917. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

3 Document No. 2.

Plaintiff's Notice of Election to Stand on Plea to Jurisdiction, to Appeal, Requesting Certificate, etc.

Filed May 31st, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law. #30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Plaintiff's Notice of Election to Stand on Plea to Jurisdiction, to Appeal, Requesting Certificate, etc.

To said American Refrigerator Transit Company and to Messrs. Brammer, Lehmann & Seevers; and Messrs. McNett & McNett, its attorneys:

The plaintiff elects to stand on its plea or motion to the jurisdiction of the court, and that the question of jurisdiction by the trial court be certified direct to the Supreme Court of the United States, for the term commencing October 8th, 1917, upon authority of section 238 of the Judicial Code, act March 3, 1891; and Boatmen's Bank of St. Louis, Mo. vs. Fritzler, 135 Federal 650, C. C. A. 8th Circuit; Weeker vs. National Enameling & Stamping Co., 204 U. S. 176, 51 Law ed. 430; Patch adm'r vs. Wabash Rd. Co., 207 U. S. 277, 52 Law ed. 204; McAllister adm'r vs. Chesapeake & Ohio Ry. Co., Supreme Court U. S. March 6, 1917. Plaintiff attaches hereto and makes part hereof a full, true and correct copy of the record in said cause and asks this court to identify same as plaintiff's bill of exceptions; and plaintiff attaches hereto and makes part hereof its statement of appeal and prayer for allowance of same, form of judgment entry requested by it, form of citation; and good and sufficient and properly executed appeal bond.

And you are notified that plaintiff will present the foregoing

papers to the Hon. Martin J. Wade, Judge of said Court, on the eleventh day of June 1917, and pray his allowance of said appeal, the signing and filing of said bill of exceptions, the execution of such certificate, the approval of said appeal bond, and an order making same operate as a supersedeas, and any and every
4 such further order as may be necessary to have allowed and *perest* such appeal.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

(Endorsed:) Filed May 31, 1917. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

5 Document No. 3.

Plaintiff's Appeal.

Filed May 31st, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law. #30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Plaintiff's Appeal.

The above named plaintiff, conceiving itself aggrieved by the orders of the aforesaid court heretofore made denying plaintiff's motion to remand said cause to the District Court of Iowa in and for Wapello County, does hereby elect to stand upon said motion, and to refuse to recognize the jurisdiction of this court in said cause, and to refuse to proceed further in this court in said cause; and under the provisions of section 238 of the Judicial Code, Act of March 3, 1891, plaintiff prays the order of this court allowing appeal direct from this court to the United States Supreme Court on said question of jurisdiction only; and that this court shall certify said question of jurisdiction as shown by the record herein.

And plaintiff herewith tenders a full, true and correct copy of the record in said cause, and prays the order of this court identifying the same, as attached hereto, as constituting plaintiff's bill of exceptions herein.

Plaintiff herewith accompanying respectfully submits suggested and requested form of judgment entry, and certificate, with form of citation, together with good and sufficient appeal bond properly executed, and prays approval of same, and an order of court making

same a supersedeas, and for an order granting certificate of this court as to jurisdiction upon said appeal, and an order dispensing with citation, or the allowance and signing of citation.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

(Endorsed:) Filed May 31, 1917. Wm. C. McArthur, Clerk, by Gertrude Dairell, Deputy.

6 Document No. 4.

Judgment, Certificate, and Appeal.

Filed and Entered September 17, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law. No. 30.

E. H. Emery & Company, Plaintiff and Appellant,

vs.

American Refrigerator Transit Company, Defendant and Appellee.

Judgment, Certificate, and Appeal.

The above named plantiff, by its counsel in open court, conceiving itself aggri-ved by the order overruling its motion to remand said cause heretofore entered, and by the order of the court now overruling its assignment of error and motion to reconsider said order, does now hereby formally elect to stand upon its said plea to the jurisdiction of said court embodied in its motion to remand said cause to the state court, and upon said assignment of error, and does now hereby formally refuse further to recognize the jurisdiction of this court, and refuses to proceed further in said cause, and whereupon the court in term time this — day of July 1917, does hereby dismiss plaintiff's petition and cause of action, and does hereby order and render final judgment that plaintiff take nothing thereby and go hence without day, and that defendant American Refrigerator Transit Company have and recover from said E. H. Emery and Company all costs in this Court in said action accrued, now taxed in the sum of — dollars.

And plaintiff, under the provisions of section 238 of the Judicial Code, Act of March 3, 1891, praying the order of this court allowing an appeal from said order and judgment, direct to the Supreme Court of the United States, the court now certifies to said Supreme Court whether or not upon the record upon plaintiff's motion to

remand said cause this court has jurisdiction of said action, or should said motion to remand be sustained.

And upon and for the reasons specified in its assignment of errors herein heretofore filed, the plaintiff does hereby pray
7 and is allowed its appeal from the order overruling its motion to remand and from this judgment now rendered, such appeal being solely upon the question of jurisdiction of this court; and such appeal being hereby granted and certified direct to said Supreme Court of the United States.

Plaintiff having rendered its proper and sufficient appeal bond, same is hereby approved, and, when filed, is to operate as a supersedeas.

Such appeal having by plaintiff been taken and allowed in term time, in open court, and counsel for defendant being at the time present, his order allowing same shall operate as a citation to said defendant, American Refrigerator Transit Company, to be and appear to and upon said appeal, at the Supreme Court of the United States at Washington, within thirty days from the date of this order.

A transcript of the record, proceedings and papers upon which this judgment is made and based is hereby identified as plaintiff's bill of exceptions and attached hereto and made part hereof as Exhibit "A" and is hereby authenticated, and filed herein and certified as constituting the complete and correct record upon which this judgment and certificate is based.

Dated this 24 day of July 1917.

MARTIN J. WADE,
Judge.

(Endorsed:) Filed July 24, 1917. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

8 Document No. 5.

Citation.

Dated —— —, 1917.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to American Refrigerator Transit Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the district court of the United States in and for the Southern District of Iowa, Ottumwa division, and filed in the clerk's office of said court, on the 17 day of September, A. D. 1917; in a cause wherein E. H. Emery & Company are appellants, and you are appellee, being number thirty on the law docket of said court, to

show cause, if any, why the order and judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin J. Wade, District Judge of the United States, this 17 day of September, A. D. 1917.

MARTIN J. WADE,
District Judge of the United States.

Service of a copy of the within citation is hereby admitted, this 17 day of September, 1917.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for said Appellee, the American Refrigerator Transit Company.

(Endorsed:) Filed Sept. 18, 1917. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

9 Document No. 6.

Appeal Bond.

Filed July 24, 1917.

Know all men by these presents, that we, E. H. Emery & Company, a copartnership of Ottumwa, Iowa, consisting of E. H. Emery, of Ottumwa, and W. W. Copeland, of Burlington, Iowa, as principal, and E. H. Emery and Leo E. Stevens, the latter of Des Moines, Iowa, as sureties, are held and firmly bound unto the American Refrigerator Transit Company, in the full and just sum of five hundred dollars, to be paid to the said American Refrigerator Transit Company, its certain attorneys, successors or assigns: To which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 29 day of May, A. D. in the year of our Lord, at a district court for the 24 day of July, 1917, in an action at law depending in said court, between said E. H. Emery & Company, plaintiff, and said American Refrigerator Transit Company as defendant, being number thirty of this court, a judgment was rendered against the said E. H. Emery & Company, and the said E. H. Emery & Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court, to reverse the judgment and order in the aforesaid suit, and citation directed to the said American Refrigerator Transit Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the eighth day of October next.

Now, the condition of the above obligation is such, that if the said E. H. Emery & Company shall prosecute its appeal to, effect, and

answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

E. H. EMERY & COMPANY,
By E. H. EMERY,
Principal.
LEO E. STEVENS,
E. H. EMERY,
Sureties.

Approved, and when filed to operate as a supersedeas.

MARTIN J. WADE,
District Judge of the United States.

(Endorsed:) Filed July 24, 1917. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

10 EXHIBIT "A."

Plaintiff's and Appellant's Bill of Exceptions.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law. No. 30.

E. H. EMERY & COMPANY, Plaintiff and Appellant,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant and Appellee.

11 *Transcript of Proceedings from State Court.*

The following constitutes a transcript of proceedings of the District Court of Wapello County, Iowa, as filed November 29th, 1916, with the clerk of the District Court of the United States in and for the Southern District of Iowa, Ottumwa division, as certified by the clerk of said State court, and as shown upon motion of the parties hereto:

12 Document No. 7.

Original Petition. Filed in Wapello County, Iowa, District Court, February 13, 1914.

"In the District Court of the State of Iowa in and for Wapello County, March, 1914, Term.

Law. #9643.

E. H. Emery & Company, a Partnership, Plaintiff,

vs.

Chicago, Burlington & Quincy Railroad Company, American Refrigerator Transit Company, a Corporation, Defendant.

Action for Damages.

For cause of action plaintiff states:

1. That during July, 1912, it was, and ever since has continued, and is now a partnership, composed of E. H. Emery, during such times and now being a resident and citizen of the State of Iowa and of Wapello County, and of W. W. Copeland, during such times and now being a resident and citizen of the same State and of Des Moines county. During such times the plaintiff has continuously been and is now engaged in conducting a wholesale fruit business, with its principal place of business in the City of Ottumwa in the county of Wapello.

2. That during such times The Missouri, Kansas & Texas Railway Company of Texas (hereinafter designated as the initial carrier) was a common carrier operating a line of steam railroad within the State of Texas, and, with its connecting lines, affording a through route via Kansas City, Missouri, to Iowa points.

3. That during such times the defendant Chicago, Burlington and Quincy Railroad Company was and is now a corporation organized and existing under the laws of the State of Illinois, a common carrier operating a line of steam railway running from Kansas City, Missouri, to Iowa, points and elsewhere. Such corporation being hereinafter designated as the delivering carrier.

13 4. That during such times the defendant American Refrigerator Transit Company (hereinafter designated as the refrigerator car company) was continuously and is now a corporation organized and existing under the laws of the State of New Jersey; engaged in transacting business in Texas, Wapello County, Iowa, and throughout the United States generally as a common carrier of freight. Such business being transacted by it as the owner and lessee of a large number of railway refrigerator cars, which under various traffic arrangements, the details of which are unknown to plaintiff, it sublet to railway companies, and the public generally for transportation of perishable freight in consideration of such mileage, per

diem, or share of the refrigeration or other charges as was determined upon between them. And said refrigerator car company, in cars furnished by it, undertook for hire to transport car load perishable freight for the public generally. That said defendant during said times was continuously and is now the owner of and operating a line of such refrigerator cars, passing through and operated in said Wapello County. That in the matter in this litigation involved the said defendant held itself out publicly to be, and it was at all such times, and is now an express company, a common carrier for hire, undertook to and did in fact receive plaintiff's perishable freight in question, and undertook to and did load the same, and for hire, undertook to and did forward the same, employing on its own behalf such agencies as it saw fit. Such representations and undertakings being by virtue of the writings hereinafter set out, and by virtue of the fact that in pursuance of same said company actually received and accepted such perishable freight for transportation on plaintiff's behalf from the Texas to the Iowa points hereinafter designated, for such compensation as said defendant might exact, and which plaintiff paid, and for which such defendant received in whole or in part through the delivering carrier. That such refrigerator car company during such times was not a private car line, but its capital stock was owned by various railroad companies constituting what is commonly known as the "Gould" System", and was thus but a name under which such railroads as common carriers for hire operated such refrigerator cars for their own use, benefit and profit. That in the following letters the said refrigerator car company held itself out publicly to plaintiff to be a common carrier of freight for hire, and by said letters and its acts pursuant thereto in receiving from
14 plaintiff and accepting for transportation for hire to destination the fresh peaches involved, induced plaintiff to believe that it was such common carrier of freight for hire, and plaintiff relied for its protection upon such belief so induced, and upon the strength thereof expended its money for said peaches and the transportation thereof; wherefore said refrigerator car company is estopped to deny its obligations herein as a common carrier of freight for hire.

Letter to plaintiff from said refrigerator car company, by T. H. Gorman, its general agent, at Tyler, Texas, June 14th, 1912, reading:

"Replying to your favor of the 11th instant, beg to advise that we will handle all of the shipments originating on the M., K. & T. Railway this season, but will not furnish all of the equipment and will secure from connecting lines such additional equipment necessary to handle. The M., K. & T. will put in their own equipment as may be necessary to handle the business. The cars will be initial iced at Shreveport and re-iced at Chatterton, either from ice sent out in the bodies of the cars, or, if necessary, can ship some car load ice to that point to do the re-icing."

"It is my understanding that the M., K. & T. has an agent now at Chatterton who will be located there during the peach movement."

Letter to plaintiff from said refrigerator car company, by E. T.

Rice, its general freight agent, at St. Louis, under date of June 14th, 1912, reading:

"Replying to your letter of the 11th instant to Freight Claim Agent Weiler, advising that you have purchased an orchard at Chatterton switch, a point on the M., K. & T. in Texas, and expect to ship 100 cars of peaches and desiring to know with whom you should take up regarding freight equipment, billing, etc. All that is necessary for you to do is to take up in the usual way with the Agent at Chatterton, placing orders for cars, etc. If you will advise the name of your representative I will be glad to refer same to the M., K. & T. traffic department in Texas, who will no doubt have their Mr. Chatham, who is in charge of that territory, call on him and explain the arrangements for handling."

Letter to plaintiff from said refrigerator car company, by E. W. Rice, its General Freight Agent, at St. Louis, Missouri, June 15th, 1912, reading:

"C. G. W. car No. 30,112, tomatoes, from Tyler, Texas, last night, consigned to you at Ottumwa, Iowa, routed via C., M. & St. P.

"Desire to request that you favor us with this business from Texas this season via St. Louis and the Wabash, for loading is going to be so heavy that we are having to lease, rent and secure cars from all possible connections, and to date the C., M. & St. P. has not favored us with an empty, and in order for us to take care of this business, particularly the July movement, we must have the assistance of consignors and consignees in routing this business via the lines that will assist us in car supply." Both the Wabash and the I. M. & S. have handled practically every empty that has been handled into Texas so far and we are now handling the empties in special trains, while the C., M. & St. P. is not giving us any assistance whatever. Our claims have all been fully adjusted with you and our understanding was that you could favor us with the business via St. Louis and Wabash when they were out of the way."

"We will also handle the business on the Katy this season. Possibly you can give us this business via the Wabash at St. Louis."

And letter to plaintiff from said initial carrier, by T. L. Peeler, its Industrial Agent at Dallas, Texas, under date June 17, 1912, said initial carrier being one of said refrigerator car company's agents in the transportation of the freight in question. Said letter reading:

"Your letter addressed to General Freight Agent, Kansas City, has been referred to me by A. G. F. A. Finch, having reference to facilities for handling peaches at Chatterton switch.

"I have just learned in the last few days that this orchard was sold, but was under the impression that it was sold to a Dallas party. Judging from your letter, it is your Company who bought the property. First, I will say that you have, in my opinion, a very attractive proposition. I have been over the orchard frequently and if its was kept up in the proper shape I am sure it would be a money maker. The land is highly adapted to the growth of fruit and I believe if the right kind of vegetables were planted you could make this a paying proposition.

"There is a very good shed which was built there a few years ago for loading and handling of fruit and truck and sufficient room for storing material. We have a spur track which serves the shed and it is our intention to make it an open switch. The authority has already been issued for the extension of this spur, and, when finished, will connect with our main line at both ends. In fact you have every facility necessary for the loading and handling of your fruit and truck.

"At Orchard Park, which is about a mile east of this point, we have a depot and agent there during the shipping season, who bills out all of the cars and also looks after the ordering of cars and having them placed. I believe that your people have a phone from your fruit shed to our depot at Orchard Park, or at least they had this arrangement last year.

"I will state further that we have made arrangements with the A. R. T. Company, who will furnish us cars this year for the handling of all fruit and vegetables moving under refrigeration. Mr. F. E. Gorman, at Tyler, Texas, is the General Agent for the A. R. T. Company, and I understand he has a man by the name of Cobb located at Greenville, who will personally supervise the handling of this fruit and truck on our Shreveport Division.

"In this connection will say that we will be very glad indeed to co-operate with you in every way possible as we are very much interested in the success of this orchard. I believe that we can co-operate to mutual advantage. I will be glad to meet you personally or your representative while in Texas, and hope that you will advise us when you are in this territory."

16 "If you are interested in buying peaches at any other point along the line, I would be glad to give you the names of those who have peaches for sale. Would you consider buying peaches at Collinsville, a point on our Fort Worth division, between Denton and Whitesboro? They will have something like 100 cars this year. Would be glad to hear from you with reference to the above and if we can furnish you any further information, it will be our pleasure to do so."

And letter to plaintiff from said refrigerator car company by E. W. Rice, its general freight agent at St. Louis, dated June 20, 1912, reading:

"Attached hereto is copy of letter of even date to Mr. W. G. Wagner, C., B. & Q., Burlington, Iowa. As stated in this letter to Mr. Wagner, the movement will be so extremely heavy, particularly from Texas and Arkansas, that we must have the assistance of all connections in furnishing us with refrigerator equipment to handle this movement, and I would greatly appreciate any influence that you can bring to bear on the Burlington to give us an increased supply of their cars. They have a large amount of refrigerator equipment and should supply us with at least 1,000 of their cars, as there is no question, but what they will benefit by this many cars or more."

Would appreciate hearing from you as to any assistance that you can give us along this line.

"Note you are routing some cars C., M. & St. P. They have only given us 12 empties to date. Cannot you get after them?"

And under the foregoing arrangements plaintiff delivered to said refrigerator car company and it received and accepted the freight in question, without issuing any writing for same, and furnished the cars for same, and loaded said freight in said cars and accepted same for transportation to destination and undertook to transport and convey the same over the lines of said initial and connecting and delivering carriers. And by virtue of which representations and conduct said refrigerator car company is as to plaintiff's freight in question estopped to deny that it is a common carrier of such freight.

5. That by virtue of the foregoing said refrigerator car company and said initial and each connecting and delivering carrier was principal each for itself so far as each handled the shipments involved, and agent each for all the others so far as concerned said implied contract for through routing and haul, and for receiving claim for damages, and all other questions pertaining to the transportation of said freight from point of origin to destination.

17 6. That on the 15th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Osceola, Iowa, one carload consisting of 400 bushel baskets of fresh peaches, and said company loaded same in M. K. & T. car 3144, said car arriving at destination on July 19th, 1912, where the transportation charge of $149.05 and refrigeration charge of $60 were paid by plaintiff to the delivering carrier, who at the time indorsed on the freight bill evidencing such payment: "Upper tier of baskets more or less jammed and turned over; contents on car floor when received at Osceola. J. E. Johnson, agent." Because of the negligent acts and breaches of implied contract, by the defendants hereinafter set out, plaintiff sustained a loss because of damage to contents of said car of peaches of 31 bushels, of the fair and reasonable market value of $1.50 per bushel, or $46.50, for which it presented its claim in writing to the defendant refrigerator car company on November 23, 1912, enclosing the original bill of lading issued for said car in plaintiff's name on behalf of said refrigerator car company by the initial carrier, and which bill of lading has never been returned to plaintiff.

7. That on the 15th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Albia, Iowa, one carload consisting of 400 bushel baskets of fresh peaches, and said company loaded same in M. K. & T. car 3395, said car arriving at Albia on July 25th, 1912, where the transportation charge of $114.40 and the refrigeration charge of $62.40 were paid by plaintiff to said delivering carrier, who at the time indorsed on the freight bill evidencing such payment: "Eleven baskets upset; peaches mashed and spilled on car floor; consignee claims seven basket- short. H. H. Goodwin, agent." Because of the negligent acts and breaches of

implied contract, by the defendants, hereinafter set out, plaintiff sustained a loss because of loss and damage to contents of said car of peaches of eleven bushels of the fair and reasonable market value of $1.50 per bushel, or $16.50 for which it presented claim in
18 writing to said refrigerator car company on November 23, 1912.

8. That on the 15th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Bethany, Missouri, one carload consisting of 400 bushel baskets of fresh peaches, and said company loaded same in M. K. & T. car 3314, said car arriving at destination on July 22, 1912, where the transportation charges of $110 and refrigeration charge of $55 were paid by plaintiff to said delivering carrier, who at the time indorsed on the freight bill evidencing such payment: "Our check 399 baskets only; 22 baskets bad order. M. D. Shamblin, agent." Because of the negligent acts and breaches of implied contract, by the defendants, hereinafter set out, plaintiff sustained a loss and damage to contents of said car of peaches of 57½ bushels, of the fair and reasonable market value of $1.50 per bushel, or $86.25 for which it presented claim in writing to said refrigerator car company by mail at St. Louis on November 23, 1912, enclosing the original bill of lading issued for said car in plaintiff's name on behalf of said refrigerator car company by the initial carrier, and which bill of lading has never been returned to plaintiff.

9. That on the 15th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to said refrigerator car company and it accepted and received for through transportation to plaintiff at Leon, Iowa, one carload consisting of 400 bushel baskets of fresh peaches, and said company loaded same in M. K. & T. car 3352, said car arriving at destination on July 22d, 1912, where the transportation charge of $110 and the refrigeration charge of $60 were paid by plaintiff to said delivering carrier, who at the time indorsed on the freight bill evidencing such payment: "Four baskets mashed." Because of the negligent acts and breaches of implied contract, by the defendants, hereinafter set out, plaintiff sustained a loss because of loss and damage to contents of said car in the amount of four bushel baskets of peaches, of the fair and reasonable market value of $1.50 per bushel, or $6, for which it presented claim in writing to the defend-
19 ant refrigerator car company by mail at St. Louis on November 23, 1912, enclosing the original bill of lading issued for said car in plaintiff's name on behalf of said refrigerator car company by the initial carrier, and which bill of lading has never been returned to plaintiff.

10. That on the 18th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Lecona, Iowa, one carload consisting of 430 bushel baskets of fresh peaches, and said company loaded same in M. K. & T. car 3079, said car arriving at destination July 23, 1912, where the transportation charge of $118 and refrigeration charge of $60 were paid by plaintiff to said de-

livering carrier, who at the time indorsed on the freight bill evidencing such payment: "70 or 75 baskets mashed some; 10 baskets turned over; peaches on floor." Because of the negligent acts and breaches of implied contract, by the defendants, hereinafter set out, plaintiff sustained a loss because of loss and damage to contents of said car in the amount of thirty bushels of said peaches, of the fair and reasonable market value of $1.50 per bushel, or $45, for which it presented claim in writing to the defendant refrigerator car company by mail at St. Louis on December 17, 1912.

11. That on the 18th day of July, 1912, at Orchard Park, Texas, plaintiff through J. A. Thedford delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Chariton, Iowa, one carload consisting of — bushel baskets of fresh peaches, and said company loaded same in Erie car 62,922, said car arriving at destination on July —, 1912, where the transporttaion charge of $—, and the refrigeration charge of $—, were paid by plaintiff to said delivering carrier, the car arriving with the decking broken, the baskets of peaches crushed, jammed, mashed and spilled over the car floor, decayed from insufficient icing, and the drain or overflow pipes stopped up and water on the car floor soaking and spoiling contents, notation to such effect being at the time of arrival, and before unloaded, indorsed by the delivering carrier upon the freight bill evidencing such payment. That in the necessary expense of sorting contents of said car, at its fair and reasonable value, and in loss of peaches so damaged and spoiled by reason of negligent acts and breaches of implied contract, by the defendants, hereinafter set out, plaintiff sustained a loss of 51 bushel of peaches of the fair and reasonable market value of $1.50 or $76.50, for which it presented claim in writing to the defendant refrigerator car company by mail at St. Louis on December 7, 1912, enclosing the original bill of lading issued for said car in plaintiff's name on behalf of said refrigerator car company by the initial carrier, and enclosing the original freight receipt bearing indorsement in effect as above stated and which papers have never been returned to plaintiff, and for the production of which plaintiff calls now upon said defendant, and hereby gives notice that unless so produced it will prove contents by secondary evidence.

12. That on the 19th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Albia, Iowa, one carload consisting of 420 bushel baskets of fresh peaches, and said company loaded same in M., K. & T. car 957, said car arriving at destination on July 25th 1912, where the transportation charge of $120.12 and refrigeration charge of $65.52 were paid by plaintiff to said delivering carrier, who at the time of arrival and before unloading, indorsed on the freight bill evidencing such payment: "Upper layer of baskets in car badly jammed and upset; some fruit spilled; ice bunkers full when received Albia July 25th." That in sorting the contents of said car plaintiff was at a necessary expense of $8., which was the fair and reasonable value of such services; in addition to which plaintiff sustained a loss of 165 bushels of said peaches, of

the fair and reasonable value of $247.50, making the total loss sustained by plaintiff $255.50, claim for which in writing was by plaintiff made upon said refrigerator car company at St. Louis November 26, 1912, enclosing the original bill of lading for said car in plaintiff's name on behalf of said refrigerator car company by the initial carrier, and which bill of lading has never been returned to plaintiff.

21 13. That on the 19th day of July, 1912, at Orchard Park, Texas, plaintiff delivered to and said refrigerator car company received and accepted for through transportation to plaintiff at Albia, Iowa, one car load consisting of 422 bushel baskets of fresh peaches, and said company loaded same in M., K. & T. car 3028, said car arriving at destination on July 26, 1912, where the transportation charge of $120.69 and refrigeration charge of $65.83 were paid by plaintiff to said delivering carrier, who at the time and before unloading indorsed on the freight bill evidencing such payment: "Top layer in car badly jammed and had to be re-sorted". That in sorting said car plaintiff was at a necessary expense of $8., which was a fair and reasonable value of such services; in addition to which plaintiff sustained a loss of 44 bushels of said peaches, of the fair and reasonable market value of $66., making the total loss sustained by plaintiff $74. That when said car left shipping point the ice bunkers were two-thirds empty. That on November 26th, 1912, plaintiff presented by mail to said refrigerator car company at St. Louis its claim in writing for said damages, enclosing the original bill of lading issued for said car in plaintiff's name on behalf of said refrigerator car company by the initial carrier, and which bill of lading has never been returned.

14. That all of the peaches contained in the eight cars hereinbefore referred to were in good, sound, merchantable condition when delivered to and accepted by said refrigerator car company and that with proper icing and without rough handling in transit same would have arrived in like condition at destination, and in which condition the fair and reasonable market value of said peaches would have been $1.50 per bushel.

22 15. That upon the arrival of each of the aforesaid cars at destination plaintiff called the attention of the delivering carrier to the condition of the car and fruit before the latter was unloaded, and protested against the receipt of same in its then condition unless carrier allow plaintiff's claim for the just damages sustained by it, and which claim was verbally asserted by plaintiff to such delivering carrier before the freight was removed from the car, and such claim was at the time by such carrier's agent reduced to writing upon the face of the freight bills as hereinbefore recited.

16. That the damage hereinbefore alleged to have been sustained to the peaches in each of said eight cars was occasioned by the fact that said refrigerator car company caused same to be loaded and stowed by inexperienced and incompetent help, in an unskillful, improper and negligent manner.

(B) That it was negligently and defectively braced in the cars by said Company.

(C) That each car was defectively and improperly constructed, in that the ice bunkers were not of capacity to hold sufficient ice to properly cool the cars and cool the fruit and keep the same cool in transit between icing stations, and so failed to preserve it in a merchantable condition so that it would be marketable on arrival.

(D) Because of the failure of said refrigerator car company and of each carrier over whose line such freight passed to re-ice each car when needed and the temperature in the car and depletion of ice in the bunkers required; whereby the ice bunkers were negligently permitted to become so depleted in transit as to permit the fruit to become heated, cooked, and causing same to become soft and mushy and to be and to become decayed and worthless; the defendants failing to keep said cars properly iced, as they had impliedly agreed by accepting for transportation such freight and exacting heavy refrigeration charges covering same.

23 (E) That each of the aforesaid cars was negligently, carelessly and roughly handled in transit, forcing loose and breaking the bracing and jolting, jarring, mashing and breaking the baskets, upsetting them in the cars, mixing, bruising, crushing and damaging the fruit, and causing same to become soft, mushy, mouldy and unmarketable.

(F) That the defendants were guilty of joint and concurrent negligence in each providing and using for each of said shipments a car not adapted to the purpose and in which the fruit was not properly and carefully loaded, stowed and braced; and in failing to re-ice the same when the depleted bunkers made it necessary, and in operating same without a reasonably sufficient supply of ice in the bunkers.

17. As to each of said cars plaintiff charges defendants jointly with one count for breach of implied contract for the safe transportation of the freight, the other count in tort for joint negligence in the handling of said freight.

18. That plaintiff is the owner of the claims arising out of the aforesaid facts. That no part of same has been paid.

19. That as part of the damages sustained and sought to be herein recovered, and included in the demands of plaintiff, and the itemization or stating of the respective amounts of same, plaintiff seeks herein to recover that proportion of the freight and refrigeration charges paid by it to the extent of the total charges so paid bear proportion to the quantity of each shipment rendered worthless; and includes and seeks herein to recover the fair and reasonable expense in sorting the fruit in each car made necessary by the wrongful acts aforesaid.

20. Wherefore plaintiff has been damaged by the defendants in the sum of six hundred, six and 25/100 dollars ($606.25) for which it prays judgment against the defendants and each of them, together with interest at the rate of six per cent per annum from the date of delivery of each car of freight to plaintiff, together with plaintiff's costs in this action.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

24 Document No. 8.

Answer of American Refrigerator Transit Company.

Filed in State Court December 1st, 1914.

In the District Court of the State of Iowa in and for Wapello County, October Term, 1914.

Law. #9643.

48/21.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Answer of American Refrigerator Transit Company.

Comes now the American Refrigerator Transit Company and for answer to count one of the petition, substituted petition and amendments thereto now on file, states:

A.

It admits that it is a corporation organized and existing under the laws of the state of New Jersey.

It admits that if any peaches were transported for plaintiff, said peaches were transported pursuant to a certain contract or bill of lading, the terms of which are substantially as set forth in the amendment to plaintiff's substituted petition.

Each and every allegation contained in said petition, substituted petition and amendments thereto, not heretofore expressly admitted, this defendant denies.

B.

Defendant further alleges that if any peaches were delivered by plaintiff for transportation, as alleged by plaintiff, all such peaches were delivered for transportation subject to a certain contract or bill of lading, a substantially correct copy of which has been set out by plaintiff and said contract is binding upon plaintiff.

By the terms of said contract it was provided:

"Claims for loss, damage or delay, must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for

delivery has elapsed. Unless claims are so made, carrier shall not be liable."

No claim has been made as provided by said contract.

25 C.

Defendant further alleges that it is a corporation organized for certain definite purposes and it had no power to make any such contract as that described by paragraph six of plaintiff's substituted petition, and any such contract, if made, was an act ultra vires the corporation and the unauthorized act of the agent making it.

D.

Defendant further alleges that if any peaches belonging to plaintiff were damaged as alleged said damages were caused by and due to the condition and inherent nature of the peaches at the time plaintiff delivered them, if any plaintiff did deliver, to the defendants for transportation and said damage was not due to any negligence on the part of this defendant.

Count Two.

For an answer to count two defendant repeats the allegations of paragraphs A. B. C. and D. hereof as fully as though here set out.

Count Three.

For an answer to count three defendant repeats the allegations of paragraphs A. B. C. and D. hereof as fully as thought here set out.

Count Four.

For an answer to count four defendant repeats the allegations of paragraphs A. B. C. and D. as fully as though here set out.

Count Five.

For an answer to Count five defendant repeats the allegations of paragraphs A. B. C. and D. hereof as fully as though here set out.

Count Six.

For an answer to count six defendant repeats the allegations of paragraphs A. B. C. and D. Hereof as fully as though here set out.

Count Seven.

For an answer to count seven defendant repeats the allegations of paragraphs A. B. C. and D. hereof as fully as though here set out.

Count Eight.

For an answer to count eight defendant repeats the allegations of of paragraphs A. B. C. and D. hereof as fully as though here set out.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for American Refrigerator Transit Company.

26 Document No. 9.

Stipulation for Trial in State Court.

Filed in State Court September 24, 1915.

Law. No. 9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9644.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9645.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9646.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9647.

E. H. Emery & Company, Plaintiff,

vs.

Chicago Great Western Railroad Company, American Refrigerator Transit Company, Defendants.

Law. No. 9648.

E. H. Emery & Company, Plaintiff,

vs.

Wabash Railroad Company, American Refrigerator Transit Company, Defendants.

Come now E. H. Emery & Company, plaintiff in the above entitled suits and Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago, Rock Island & Pacific Railway Company; Chicago Great Western
27 Railroad Company; E. B. Pryor, receiver of Wabash Railroad Company, and American Refrigerator Transit Company, defendants in the above entitled suits and stipulate and agree:

1.

A jury in these cases is hereby waived and these cases shall be tried to the court without a jury.

2.

For the purposes of trial in the District or Appellate courts, these cases shall be tried together upon the same evidence and record so far as applicable. All testimony, depositions, exhibits, answer to interrogatories and all other evidence and all objections thereto and all motions and all rulings of the court offered, introduced or made at the trial of these cases shall be considered, so far as applicable, as offered, introduced or made at the trial of each and every one of these cases.

Testimony, depositions, exhibits, answers to interrogatories and all other evidence and all objections thereto, and all motions and all rulings of the court offered, introduced or made, referring to specific car loads shall be considered as offered, introduced or made only in the one case in which the car load referred to is involved.

III.

Separate judgments shall be rendered in each case, including all costs in each case, and pro rata part of costs of general nature.

CHESTER W. WHITMORE,
Attorney for E. H. Emery & Company.
McNETT & McNETT,
BRAMMER, LEHMANN & SEEVERS,
Attorneys for American Refrigerator Transit Company.

W. D. EATON,
Attorney for Chicago, Burlington & Quincy Railroad Company.

HUGHES, SUTHERLAND & TAYLOR,
Attorneys for Chicago, Milwaukee & St. Paul Railway Company.

SARGENT, BANNISTER & JOHNSON,
Attorneys for Chicago, Rock Island & Pacific Railway Company.

CARR, CARR & EVANS,
Attorneys for Chicago Great Western Railroad Company.

J. L. MINNIS,
N. S. BROWN,
McNETT & McNETT,
Attorneys for E. B. Pryor, Receiver of Wabash Railroad Company.

28 Document No. 9½.

Trial.

Jury waived and cases 9343 to 9348 inclusive tried October 4th, 1915, to October 16th, inclusive, before his Honor C. W. Vermilion, Judge of the District Court in and for Wapello County, Iowa.

29 Document No. 10.

In the District Court of the State of Iowa in and for Wapello County.

Law. #9643.

E. H. Emery & Company, a Partnership, Plaintiff,

vs.

Chicago, Burlington & Quincy Railroad Company, a Corporation; American Refrigerator Transit Company, a Corporation, Defendants; and said Chicago, Burlington & Quincy Railroad Company, and Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Garnishees.

Auxiliary Petition in Attachment.

Filed August 31, 1916.

Comes now the plaintiff and shows unto the court that it filed in this cause its original petition February 13, 1914, now pending against said Chicago, Burlington & Quincy Railroad Company and American Refrigerator Transit Company under the above number.

2. That plaintiff is a co-partnership, composed of W. W. Copeland, a resident of Burlington, Iowa, and of E. H. Emery, a resident of Ottumwa, Iowa, at which latter point it has its principal place of business where it is engaged in the wholesale fruit business.

3. That the defendant American Refrigerator Transit Company is a corporation organized and existing under the laws of the State of New Jersey.

4. That the defendant American Refrigerator Transit Company is a foreign corporation.

5. That the defendant American Refrigerator Transit Company is a non-resident of the State of Iowa.

6. That the plaintiff's claim is in tort to recover damages in the principal sum of $612.25 occasioned by the wrongful acts of the defendants jointly in handling fresh peach shipments for plaintiff from Orchard Park, Texas, to various points, the details of which are recited in the pleadings in the principal action made part hereof by reference.

30 7. Plaintiff herewith accompanying files its proper, good and sufficient bond in the penal sum of $1,200.

8. Plaintiff presents this petition to the presiding judge of this court and prays that he make allowance here on that property in value of the principal and interest involved, approximately $800 belonging to said American Refrigerator Transit Company, may be attached.

9. Plaintiff prays the writ of attachment of this court issue

against the goods, chattels, lands, tenements and effects of said American Refrigerator Transit Company.

10. That under said writ the Chicago, Burlington & Quincy Railroad Company be garnished as a supposed debtor of said American Refrigerator Transit Company on wheelage or mileage of cars of the latter hauled by the former, and for icing charges belonging to the latter collected by the former.

11. That under said writ the Chicago, Milwaukee & St. Paul Railway Company be garnisheed as a supposed debtor of said American Refrigerator Transit Company on wheelage or mileage of cars of the latter hauled by the former, and for icing charges belonging to the latter collected by the former.

12. Plaintiff avers that no property of said American Refrigerator Transit Company is known to plaintiff on which the attachment can be executed, and that, as plaintiff is informed and believes and charges the fact to be, said American Refrigerator Transit Company has property within the state not exempt, such property consisting of its refrigerator cars in possession of common carriers within this state, and such property consisting of wheelage or mileage to be paid by said common carriers to said American Refrigerator Transit Company for use of said cars; and said property consisting of icing charges collected by such common carriers on refrigerated shipments for and on account of said American Refrigerator Transit Company.

13. Wherefore plaintiff prays the order of this court or any judge thereof requiring said American Refrigerator Transit Company and said garnishee to attend before him, or before the court in which this action is pending, and give information by its authorized accounting officer having charge of such matters, respecting
31 such property of the American Refrigerator Transit Company, and to produce then and there its books and papers in which it records such transactions.

14. Plaintiff annexes the following interrogatories addressed to said American Refrigerator Transit Company; and to the garnishees Chicago, Burlington & Quincy Railroad Company, and Chicago, Milwaukee & St. Paul Railway Company, and requires answer thereto under oath from each of them, under the provisions of section 3604 et seq. of the Iowa code.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

Various interrogatories attached duly verified by E. H. Emery.

Order.

Upon the filing and presentation in open court this 31st day of August 1916 of the within auxiliary petition it is hereby ordered that upon filing bond in the penal sum of $2,500, with good and sufficient surety to be approved by the clerk of this court, it is allowed that the writ of attachment of this court issue against said American Re-

frigerator Transit Company in the value of $800 of its property and it is so ordered.

And any garnishee, each through its proper officer having charge of such matters, is hereby commanded to be and appear before this court, in open session, at Ottumwa, Iowa, at the court room in the court house, at the hour of nine o'clock in the forenoon on the 16th day of September 1916 and answer in open court such questions as plaintiff may propound touching the property of said American Refrigerator Transit Company, if any, subject to said writ of attachment. That notice of such hearing be given in writing to said American Refrigerator Transit Company by service of a copy of this auxiliary petition and of this order upon its counsel of record herein, and to said garnishees by notice in writing served upon each, at least ten days prior to the time set for such hearing.

C. W. VERMILION,
Judge.

32 Service of the foregoing auxiliary petition and order accepted and copy of same received for and on behalf of said American Refrigerator Transit Company this 31st day of August 1916.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for American Refrigerator Transit Company.

Bond.

Duly executed bond in said penal sum of $2,500, with surety, approved by the clerk of said Court, filed August 31st, 1916.

33 Document No. 11.

Filed August 9, 1916.

In the District Court of Iowa, in and for Wapelle County.

E. H. EMERY & Co., Plaintiff,

vs.

C., B. & Q. Ry. Co. et al., in Case No. 9643; C., M. & St. P. Ry. Co. et al., in Case No 9644; C., M. & St. P. Ry. Co. et al., in Case No. 9645; C., R. I. & P. Ry. Co. et al., in Case No. 9646; Wabash Ry. Co. et al., in Case No. 9647; C. & G. W. Ry. Co. et al., in Case No. 9648, Defendants.

Opinion.

The plaintiff, a co-partnership, is a wholesale dealer in fruits and vegetables. The above entitled actions are brought against the sev-

eral defendants to recover damages caused by injury to transit to various shipments, in car lots, of fresh peaches from a point on the M., K. & T. Railroad in Texas to various points in Iowa and Missouri. The American Refrigerator Transit Co. is a party defendant in each of the suits. By agreement a jury was waived and the cases were tried together upon the same evidence, so far as applicable, and submitted to be decided in vacation.

Most of the shipments in question were made under what is termed the uniform bill of lading, which has been filed by the carriers with, and approved by, the Interstate Commerce Commission. Certain of the shipments, however, were made under a form of bill of
34 lading not so filed and approved. This form appears upon its face to have been intended for use only within the State of Texas, and, whatever may have been the circumstances attending its use, in these instances no advantage can accrue to either party on account of any difference between its terms and the uniform bill of lading. That is to say, since one shipper can secure no advantage over others by private contract with the carrier, either in respect to rates, conditions of shipment or character of service, all shipments are held to be governed by the terms and conditions of the tariffs published and filed with the Commission, of which the uniform bill of lading is a part, and, hence, to be made under its terms, no matter whether any bill of lading was, in fact, issued, or what attempt was made to contract otherwise. Harminghousen vs. Express Co., 167 Iowa. 230. Chicago & C. Ry. Co. vs. Kirby, 225 U. S., 155; 56 L. Ed., 1033. Atchison & C. Ry. Co. vs. Robinson, 233 U. S., 173; 58 L. Ed., 901. Clegg vs. Ry. Co., 203 Fed., 971.

But for all present purposes the terms of the so-called Texas bill of lading, issued for some of the cars in question, do not differ in material respects from the other. The uniform bill of lading contains this clause:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, * * *. Unless claim are so made the carrier shall not be liable."

The defendants plead that there has been no compliance with this provision. On behalf of plaintiff there is no claim that this clause of the shipping contract is, generally speaking, invalid, but it is contended that under the facts shown no such filing of a written claim was required, or that there was either a compliance with the contract in this respect or a waiver of compliance.

Without now taking account of certain respects in which the circumstances differ in some of the cases, or as to some of the cars, the facts, speaking generally, are as follows:
35 Plaintiff bought the peaches in an orchard at Chatterton, Texas, a mere siding near the station of Orchard Park, on the line of the M., K. & T. Railroad, early in June, 1912. In a few days, apparently in response to inquiries, officials of the refrigerator company wrote plaintiff, in substance, that the refrigerator company would handle all shipments originating on the M., K. & T. Ry. that

season, using its own and M., K. & T. equipment and obtaining such additional equipment from other lines as might be necessary; that cars would be initial iced at Shreveport and re-iced at Chatterton and that all it was necessary for plaintiff to do was to take up, in the usual way, with the agent at Chatterton the placing of orders for cars. Practically the same information was conveyed to plaintiff by the M., K. & T. Railway Company.

Shipments began about the middle of July and the last of the cars in question was delivered on July 31st. The peaches in all the cars on arrival at the various points of destination were in a more or less damaged condition, due, to a considerable extent at least, to insufficient ice and to improper loading and stowing, or rough handling, or both; and, perhaps in some instances, to delay.

Upon the various bills for freight and refrigerator charges, which were receipted by the local agents of the delivering railway companies and retained by plaintiff, there were made, at plaintiff's request, by the local agents, notations of the condition of the peaches on arrival. These notations, of course, vary greatly. A few taken at random will suffice to show their general character. "Car arrived under ice, one-half full, about 75 baskets lids off, part of contents on floor." "255 baskets good peaches, not properly racked to start with, racking slipped and let top rows of peaches down, making all weight on lower baskets, mashing several baskets." "More or less ripe decaying; loaded too ripe for long haul." "Car arrived
36 under ice, one half full, car had been very rough handled, 100 baskets jammed, lids off, contents in poor condition, partly decayed." Bunkers full ice, fruit overripe and shows heavy decay."

In some instances the plaintiff by letter to the railroad agent at point of destination requested that the car on its arrival be examined and the condition of the peaches noted on the expense bill. In a few cases such a request was so made after delivery of the shipment, the claimed condition of the peaches being stated more or less certainly in the letter. In all but two instances these subsequent requests were made after the expiration of four months and these will be more particularly referred to hereafter.

On August 7, 1912, plaintiff wrote Mr. Weiler, Freight Claim Agent for the refrigerator company, at St. Louis, as follows:

"I regret to inform you that we will have some heavy claims against your company for insufficient icing and the use of meat cars in place of fruit cars for handling our peaches from Texas, as well as Arkansas. We are making our records clear and giving you this advance notice that we will file claims for every A. R. L., S. R. L. and N. C. L. car used in the movement of our peaches.

Please advise me whether or not I will file claim with the delivering line direct or with your office when properly made up. If I remember correctly we filed them two years ago with the delivering lines, which required unnecessary time and investigation. Please instruct me what I shall do in this case, for if I remember correctly

we had to withdraw the papers from these lines and turn them over to your company direct."

Plaintiff received in reply a letter saying:

"I desire to acknowledge receipt of your letter of the 7th inst., in regard to claims that you anticipate filing on shipments of peaches from Texas and Arkansas.

I am indeed surprised to note that you state that you will file claims for every A. R. L., S. R. L. and N. C. L. car used in the movement of your peaches, for the reason that we placed every precaution necessary in connection with the proper icing of peach shipments in this class of equipment. * * * most of these cars reached destination in good condition. Regret very much to learn that you anticipate filing number of claims and it may be that after thorough investigation and after you have secured all the facts it may not be so bad as you anticipated at the time your letter was written.

Whatever claims you have would suggest that you file with the delivering lines so that they can make necessary investigation of the facts covering arrival at destination etc. As a matter of record
37 would also suggest that you send me copies of your letters transmitting claims to the different roads with numbers of cars etc."

On August 15th Mr. Emery wrote Mr. Weiler as follows:

"I acknowledge receipt of your letter of the 14th, regarding claims on A. R. L., S. R. L. and N. C. L. cars and have no doubt that you placed all precaution you possibly could on the movement of these cars. * * * I think you know me well enough to know that I would not file an unjust claim, but that I shall ask and demand that every car of peaches that arrived in more or less bad condition and was sold on the basis of damaged fruit, so that the price was reduced, that we will file a claim for the market value of these goods at the time they were received at destination. My records are clear and I hope it may not be as bad as I anticipated in my former letter.

If you recall, two years ago we filed claims with the delivering lines and will do so if you suggest it this time. It takes unnecessary time to do so, but in the event you request me to file with the delivery lines I will send you a copy of the letter referring to each car number."

On August 26th Mr. Weiler replied:

"Referring to your letter of the 15th inst., having further reference to claims that you anticipate filing on recent shipments of peaches. Desire to state that it is my desire to assist you in every way possible, with a view of having any claims that you may file properly and promptly disposed of, and while those claims ordinarily should be filed with the carriers, it may be that I can handle more promptly by having same filed with this office direct. You may, therefore, send your claims to me and they will be thoroughly investigated and disposed of at as early date as possible."

It is to be noted that there are no A. R. L., S. R. L. or N. C. L. cars involved in these suits.

In 1910 plaintiff had received shipments of peaches from Texas over the Burlington, Rock Island and Milwaukee roads that were damaged in transit. Claims for the damages were presented to the delivering carriers after the expiration of four months. They did not invoke the fourth month's clause and, indeed, are not shown to have done or said anything in respect to them. Later, at the request of Mr. Weiler, the claims were withdrawn from the railroads and filed with refrigerator company and settled by Mr. Weiler.

In December, 1912, plaintiff sent by mail to the refrigerator company at St. Louis written claims for the several amounts now in the issue, except in the case of eight cars involved in the action against the Chicago & Great Western Railway Company. It is not
38 questioned but that these claims, if they had been presented in time to the proper person, at the proper place, were sufficient in form to constitute a compliance with the terms of the bill of lading. In January, 1913, the claims were returned to plaintiff by Mr. Weiler with the statements that he only agreed to handle claims on A. R. L., S. R. L. and N. C. L. cars and that his letter did not contemplate the handling of claims on shipments moving off of the M., K. & T., and that as most of the damage appeared to be due to rough handling the claims should be filed with the M., K. & T. at Dallas.

Sometime later Mr. Rice, General Freight Agent of the refrigerator company, in conversation with Mr. Emery in reference to these claims, said there was no need to bring suit on them as "we intend to pay these as soon as we can get around to it."

Upon these facts plaintiff, as stated, claims: first, that no presentation of the claims within four months was necessary; second, that the provision was complied with; or, third, that it was waived.

1. It is argued that because the local agent of the delivering carrier is shown to have had actual knowledge of the damaged condition of the peaches on arrival no presentation of a claim therefor within four months was necessary. The cases cited in support of this contention, so far as they have been accessible, are either cases where there was a compliance with, or a waiver of, the provision, or relate to provisions of the shipping contract requiring notice of damage or notice that a claim would be filed before the goods were removed or mingled with others, or within a very limited time, the evident purpose being to enable the carrier to inspect the property and ascertain its condition. A clear distinction between such provisions and the four months' clause here involved is recognized by the authorities. In Chicago &c. Ry. Co. vs. Williams, 142 S. W., 827, it is said:

"Counsel for appellee contends that, inasmuch as appellant's agent at the point of delivery knew that the box was lost, the presentation of a claim was unnecessary, and in support of his contention
39 he relies upon the decision of this court in Ry. Co. v. Ayres, 38 W., 515. The recent case of Ry. Co. v. Cumbie, 141 S. W., 939, is in line with the Ayres case. But there is a broad distinction

between these cases and the present one. In the former cases the requirement was that notice of damage should be given and this court held that formal notice was unnecessary where the carrier received notice from other sources. In the present case the requirement is not merely for notice to the carrier that damage has resulted, but it is that a claim for the loss, damage or delay shall be presented within the stipulated time. The purpose of the requirement is to give the carrier timely opportunity to investigate the claim after the same has been presented."

To the same effect is Cumbie vs. Ry. Co., 151 S. W., *151 S. W.*, 237, and having some bearing on the question The St. Hubert, 107 Fed., 727, and Kidwell vs. Oregon Short Line, 208 Fed., 1.

The question, however, would seem to be set at rest by the recent case of Georgia &c. Ry. Co. vs. Blish Milling Co., 36 Sup. Ct. Rep., 541, decided in May last. Justice Hughes in that case, where the consignee had refused to accept a shipment of flour damaged in transit and the carrier had sold it, said, speaking of the four months' clause of the uniform bill of lading:

"It may be urged that the carrier is bound to know whether it has delivered to the right person, or according to instructions. This argument, however, even with respect to the particular carrier who makes a misdelivery, loses sight of the practical object in view. * * * The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom and in no respect repugnant to public policy that the carrier, by its contracts, should require reasonable notice of all claims against it, even with respect to its own operations. * * * The clause gave abundant opportunity for presenting claims, and we regard it as both applicable and valid. * * * We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

Upon the authority of this case the four months' clause has since been held applicable to a case where the carrier made delivery to one not entitled to the property and took a bond indemnifying it against damages in so doing. Kemper Mill. Co. vs. Ry. Co., 186 S. W., 8.

2. The only thing upon which a claim of compliance with
40 the provision in question can be predicated is the fact that the local agents at plaintiff's verbal or written request made notations on the expense or freight bills of the condition of the peaches on arrival. When the freight and other charges were paid these bills were receipted and surrendered to plaintiff. No case has been cited holding that such a notation, or the making of it under such circumstances, would constitute a compliance with the requirement. On the contrary, in the case of St. L. &c. Ry. Co., vs. Overton, 178 S. W. (Tex.), 814, it was said:

"Appellee's insistence that the notation made by the agent of the delivering carrier on the expense bill, at his instance, was in effect

a notice in writing in compliance with the stipulation is not believed to be tenable. Even if it should be said, and we think it should not be, that the agent acted for appellee and not for the carrier in making the notation, it was not such notice to the carrier as the stipulation entitled it to."

As heretofore stated, in two instances a written request was made for such notations after delivery of the peaches and within four months. Concerning A. R. L. Car 8900, in one of the cases against the C., M. & St. P. Ry. Co., plaintiff sent to the agent of the railway company at Laredo a letter (unsigned), as follows:

"We find a note from our salesman saying the freight on the Laredo car of peaches is $178.00 and 68 bushels were lost in sorting. Kindly advise us by return mail whether or not this freight has been paid by the parties handling the car and whether we are to send you a check direct. Please see that a notation is made on the expense bill of the exact condition of the car on arrival, whether or not the fruit had to be sorted and note that 68 bushels were lost. It is important that this notation is made on the expense bill, so that we may have this information in filing claim with the southern railroad."

Respecting M., K. & T. Car 957, in the case against the C., B. & Q. Ry. Co., plaintiff wrote the agent at Albia:

"We enclose herewith check for $199.44 to cover freight on M., K. & T. 957. Please make written notation on the face of the exact condition when it arrived in Albia, the condition of the ice in the bunkers, whether or not any freight was mashed, broken or spilled and all the general points as regards condition of the fruit. If we remember rightly this car arrived in bad condition and we shall need this notation to make a claim against the A. R. L. Company for insufficient icing enroute."

41 I am unable to see that either of these letters constitutes the "making of a claim" such as is required by the bill of lading, as construed by the authorities. St. L. &c. Ry. Co. vs. Overton, supra. Chicago &c. Ry. Co. vs. Williams, supra. Cumbie vs. Ry. Co., supra. Georgia &c. Ry. Co. vs. Blish Milling Co., supra.

3. Plaintiff's claim that the defendants waived a compliance with the four month clause of the bill of lading is met by the contention that the carriers have no power to waive it, or any provision of the uniform bill of lading. It is said, in effect, that since, under the Federal statutes relating to interstate commerce, the right of individual contract has been taken away, and all shippers must be treated alike in respect to service and facilities as well as rates, to permit the carrier to contract differently with different shippers as to what shall be required of them in the presentation of claims for damage would be to give one a preference over another. And that the carrier cannot, by waiving the provisions of the contract after the shipment, do indirectly what it was prohibited from doing directly before the shipment.

At the time of the submission of the cases there was less authority for this position than there is today. There are numerous cases decided before the trial holding that such provisions as the one in question, being for the benefit of the carrier, could be waived by it after the shipment. Among them are Gamble vs. Ry. Co., 137 N. W. (Minn.), 19; St. Louis &c. Ry. Co. vs. Laser, 179 S. W. (Ark.), 189; Mairn vs. Ry. Co., 106 S. W. (Mo.), 102; Shama vs. Ry. Co., 115 N. W., 403. At that time the Supreme Court of the United States had said a carrier could not waive a statute of limitations in respect to the recovery of an overcharge. Phillips vs. Ry. Co. 236 U. S., 667; 59 L. Ed., 774. The logical conclusion from the
42 discussion and reasoning in that case, as well as from numerous other decisions upon other phases of the subject of discrimination by carriers, is that the same rule would, when occasion arose, be applied to the four months' clause. And since the trial, the Supreme Court, in the same case of Georgia &c. Ry. Co. vs. Blish Mill. Co., supra, speaking of the same provision—though no question of waiver was in the case—has said:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore those terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the ver- abuses at which it was aimed."

An appellate court in Missouri, acknowledging that prior decisions in that State on the subject of waiver are superceded in respect to the provisions of bills of lading in interstate commerce by the Federal statute and decisions of the United States courts, has twice in the last few months held it beyond the power of the carrier to waive the four months' clause. Banaka vs. Ry. Co., 186 S. W., 7. Kemper vs. Ry. Co., supra.

However, the Interstate Commerce Commission, whose approval of the uniform bill of lading as a part of the carrier's tariffs gave it such vitality and force that the courts have come to say its terms cannot be waived by the party for whose benefit they were made, at the request of the carriers in the territory covered by these shipments, on February 9, 1914, by a formal order expressly authorized them to waive the four months' clause in respect to claims presented prior to December 1, 1913, and claims accruing within two years past that should be presented to the carrier on or before April 1, 1914. The effect of this order has been considered, so far as I am advised, only in the case of Banaka vs. Ry. Co., supra. There it was
43 denied effect because its terms did not cover the shipment in question and because it had not been plead and proved. Neither of those objections is good here.

The order at most, however, only authorized the carriers to waive the provision: it did not require or command it. And, so far as the defending railway companies here are concerned, if it should be said

they had the power to waive it, still the fact of waiver must be found to warrant a recovery against them.

Upon the facts it seems quite plain that the railroads did nothing that in any event could be held to constitute a waiver. In fact, they are not shown to have done anything at all in respect to these, or, indeed, any claims of plaintiff, unless they are to be bound by the acts of the refrigerator company upon the theory of agency. The railroads' local agents, it is true, had knowledge of the condition of the peaches and at plaintiff's request made notations thereof on the freight bills. But there is no element of waiver in this.

The relations of the refrigerator company to the plaintiff and the other defendants and the initial carrier have been subject of much discussion in argument. Under a written contract with the M., K. & T. Ry. Co., the initial carrier, providing for such service, the refrigerator company furnished the cars, loaded and stowed the peaches and iced the shipments. It is not shown to have sustained any relations with the delivering carriers, defendants, except they seem, in some instances, to have looked to it for payment for such ice as was supplied by them. Nothing is seen in this situation that would warrant the conclusion that the refrigerator company had any authority to waive for the delivering railroads the provision of the contract requiring the presentation of claims within four months. Granting that the filing of claims with the initial carrier at point of origin within four months would have preserved any right of action plaintiff had against the delivering road, and even that a waiver
44 by the initial carrier would have bound it also, it by no means follows that the refrigerator company, who, through its employes, rendered certain services for the initial carrier in connection with the shipment, had authority, through other agents at St. Louis, to waive the provisions of the bill of lading on behalf of the refrigerator company, after first advising plaintiff to file claims with the delivering carrier, subsequently directed them to be sent to him, but the railroads are not shown to have any part in or knowledge of this. The same is true of the transaction in 1910. Then plaintiff's claims were presented to the delivering carriers after four months. No action whatever by the railroads is shown, but on request of Mr. Weiler they were withdrawn and filed with him, and he—not the railroads—settled with plaintiff without invoking the four months' clause.

The conclusion is inevitable, it seems to me, that plaintiff, having failed to show either a compliance with or a waiver of the provision of the contract requiring claims to be presented in writing within four months, cannot recover against the defendant railroads.

As to the refrigerator company, if it is a common carrier its relations, obligations, liabilities and rights would, it would seem, be governed by the law relating to interstate carriers, and the terms of the bill of lading, whether it was a party to it or not. Nickelson vs. Judson, 109 N. E., 281. Boston &c. Ry. Co. vs. Hooker, 233 U. S., 97; 58 L. Ed., 868. Baltimore &c. Ry. Co. vs. Box Co., 94 N. E., 903. Keithly vs. Lusk, 177 S. W., 756. Kansas City So. Ry. Co. vs. Carl, 227 U. S., 639; 57 L. Ed., 683. Southern Ry. Co. vs. Pres-

cott, 240 U. S., 632. Georgia &c. Ry. Co. vs. Blish, supra. To warrant a recovery against it as a carrier it would probably be necessary to find that it could waive and had waived the four months' notice clause of the bill of lading. If it be concluded, in the face of
45 the very evident trend of judicial decision to the contrary, that it had the power to do so, there would be little difficulty in finding that it had waived a compliance with this provision. Not only its conduct in respect to these particular claims, but its course of dealing in connection with like claims arising in 1910 would warrant such a finding—the latter practice being a proper element for consideration where it was, as in this case, known to and relied upon by the shipper. The Westminister, 127 Fed., 680.

But the Supreme Court of the United States has said of a car line company performing like functions and sustaining to the railroads and shippers like relations to those disclosed in this case that it is not a common carrier. Ellis vs. Interstate Commerce Com., 59 L. Ed., 1036. No facts appear, either in its dealings with plaintiff, or its activities in general, that would warrant the conclusion, in the light of this decision, that the defendant refrigerator company is a common carrier.

If it is not a common carrier, then its liability to plaintiff, if any be found, must be based upon its failure to perform some other duty or obligation than that imposed upon a common carrier. It must be based upon a violation of some undertaking or contract with plaintiff, or upon the violation of its contract with the initial carrier, or upon a tort—the failure to properly perform some duty owing by it to plaintiff and constituting negligence.

Plaintiff had no contract of carriage with the refrigerator company, as was the case in Cownie vs. Mer. Dis. Co., 130 Ia., 327 cited in argument. Indeed, it had no contract with plaintiff at all. The correspondence in evidence discloses that shortly before these shipments began plaintiff, evidently in response to inquiries, was informed by the industrial agent of the M., K. & T. Ry. Co. of its facilities for handling the fruit, that its local agent would look
46 after ordering cars, placing them and billing them out, that it had made arrangements with the refrigerator company to furnish cars for handling all fruit and vegetables under refrigeration. By officials of the refrigerator company plaintiff was, in like manner, told that it would handle all such shipments originating on the M., K. & T., that the latter had an agent at Chatterton and all it would be necessary for plaintiff to do would be "to take up in the usual way with the agent at Chatterton the placing of orders for cars * * *." It is not seen how this correspondence can be construed into a contract between plaintiff and the refrigerator company.

The plaintiff with this information from both parties as to the situation made the shipments under bills of lading issued by and in the name of the railroad company.

Plaintiff's contract was with the initial carrier, the M., K. & T. Ry. Co., whose duty it was under the law and its contract to carry safely and with regard to the perishable character of the shipment. Board vs. Ry. Co., 79 Iowa, 578. Taft vs. Express Co., 133 Iowa,

522. The refrigerator company under its contract with the carrier became the latter's agent and undertook to perform certain of the things required of the carrier under its contract of shipment with plaintiff. Arthur vs. Ry. Co., 204 U. S., 505; 51 L. Ed., 590. President &c. vs. Express Co., 93 U. S., 174; 23 L. Ed., 872. Pennsylvania &c. Ry. Co. vs. Ray, 102 U. S., 451; 26 L. Ed., 141. New York &c. Ry. Co. vs. Cromwell, 49 L. R. A. (Va.), 462. Mathias vs. Ry. Co., 61 L. R. A., 824.

In a case upon which plaintiff relies, McConnell vs. Ry. Co., 56 S. E. Rep., 559, it was held that if the shipper's contract for the car and its icing was with the refrigerator company and, to the plaintiff's knowledge, the railroad acted merely as its agent in furnishing the car, the latter would not be liable for failure to properly ice
47 the shipment, but the shipper must, in such case, look to the refrigerator company. That is to say, the principal, not the agent, would be liable. Of course, the relations of the parties, not their names, control; and if the doctrine of that case be applied to the facts of this, where the relationship is reversed and the refrigerator company is the agent, it is not seen how it sustains a claim of liability on the part of the refrigerator company. In that case the refrigerator company was not a party and the railroad company was held as principal, there being no claim, or occassion to claim, that it was liable if only an agent. There is no discussion of the liability of an agent or a third person for a failure to perform the contract with the principal, or for negligence in performing it.

Counsel for plaintiff is understood to concede in argument that if the refrigerator company was the agent, merely, of the railroad company it would not be liable to plaintiff for a failure to perform its contract with the railroad, and that the cause of action as against the refrigerator company is in tort.

Can the refrigerator company, the agent of the carrier, be held liable to plaintiff for damages caused by the manner in which it performed its service for the carrier?

In Williams vs. Dean, 134 Iowa, 216, in speaking of the officers of an agricultural society who were sought to be held liable for injuries received by plaintiff on the society's ground, it is said:

"The action sounds in tort and is manifestly for trespass or perhaps for trespass on the case. Defendants were, of course, agents of the society. They were not the society itself, but were acting purely in a representative character. If liable at all it is because of what they did. If they were guilty of some misfeasance or trespass, as distinguished from mere no-feasance, then they were, and are, liable and they cannot shield themselves by saying that they were acting as agents for the society. * * * No one is permitted to say in an action against him for trespass or for misfeasance that he was acting as an agent in doing the matters complained of and is therefore not liable. * * * On the other hand, no agent is liable to a stranger simply for no-feasance; that is to say, for failure to do some act which his principal commits to his care. He may be
48 liable for breach of contract to his principal, but not to a stranger for a tort. These views are stated with great force

and perspicuity in Murray vs. Usher, 117 N. Y., 542, and Cincinnati Ry. Co. vs. Robertson, 115 Ky., 858. * * * Nonfeasance is the non-performance of some act which ought to be performed and misfeasance is the performance of an act in an improper manner, whereby one receives an injury."

What constitutes misfeasance is more elaborately defined in many other cases announcing the same doctrine. In Ellis vs. McNaughton this language is found:

"It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance. But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, but it is misfeasance, doing improperly."

Osborne vs. Morgan, 130 Mass., 102; 39 Am. D., 437. Dean vs. Brook, 38 N. E., 829. Carson vs. Quinn, 105 S. W., 1088. Strielwel vs. Bowman, 37 S. W., 404. Tippecanoe &c. vs. Jester, 101 N. E., 915. Bell vs. Jaselyn, 63 Am. D., 741. Baird vs. Shipman, 23 N. E., 384. Murray vs. Usher, 117 N. Y., 542; 23 N. E., 564.

In Greenburg vs. Whitcomb, 63 N. W., 93, a foreman who set a man to work on a dangerous machine was held liable for a resulting injury. In Nashville &c. Ry. Co. vs. Price, 148 S. W. (Tenn.), the defendant railway company as agent for the Pullman Company in the sale of sleeping car tickets sold a ticket over the wrong route, resulting in plaintiff's expulsion from the sleeping car. It was said:

"Under the proof adduced in this case it is sufficient to say that the railway company was the agent of the Pullman Company with reference to the sale of sleeping car accommodations. It is clearly such an agent upon this record. Its acts in this matter, therefore, were those — misfeasance and negligence for which the agent as well as the principal is liable."

In a note to Ward vs. Pullman Co., 25 L. R. A., 343, the subject is discussed at length.

49 With the doctrine of these authorities accepted by the Supreme Court of this State, as it is in the Williams-Dean case, there is no occasion to go further. It seems plain that while plaintiff would have no recourse against the refrigerator company if the latter had refused to carry out it- contract with the carrier, yet when it entered upon the performance of the work it undertook as the agent of the carrier to do it and was under a duty to plaintiff to use reasonable care in the manner of its execution and so as not to cause injury to plaintiff as the natural consequences of its acts. If it loaded and stowed the peaches it was bound to

exercise reasonable care in so doing and would be liable to plaintiff for the resulting damages if it did not although plaintiff would have had no cause of action against — if it had refused to load and stow them at all. The same thing is true as to the icing.

It follows from the views here expressed that the defendants, the railway companies, are entitled to judgments in their favor, except that the Chicago, Burlington & Quincy Railroad Company, in case No. 9663, is held liable in Count One for an overcharge of $34.35 and a portion of the costs.

It is understood that in this situation it is desired to raise some question as to the right of plaintiff to judgments against the refrigerator company so that the determination of the several amounts for which it may be liable upon the respective counts in the different cases will be reserved until the determination of such question.

Any question so arising or any motions for new trial will be taken up on the first day of the next term of court.

Dated August —, 1916.

C. W. VERMILION,
Judge.

59 Document No. 12.

Notice of Attachment under Auxiliary Petition.

Filed in State Court September 15, 1916.

In The District Court of the State of Iowa in and for Wapello County, August Term, 1916.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY et al., Defendant.

To said American Refrigerator Transit Company:

You are hereby notified that on or before the 13th day of February A. D. 1914 the petition of the plaintiff in the above entitled cause was filed in the office of the clerk of the District Court of the State of Iowa, in and for Wapello County, claiming of you the sum of six hundred twelve and 25/100 dollars as money justly due from you, and interest thereon at 6 per cent from the 1st day of August A. D. 1912, in law action number 9643 now pending on the docket of said court, against your company and the Chicago, Burlington & Quincy Railroad Company jointly for damages occasioned by your concurrent acts to fresh peaches shipped by plaintiff from Orchard Park, Texas, in July and August, 1912.

That said Chicago, Burlington & Quincy Railroad Company has been garnisheed as a supposed debtor of yours and has been summoned in by said court to appear and answer in person through its

proper officer at the court house in the City of Ottumwa in Wapello County, Iowa, at nine o'clock in the forenoon of Saturday, September 16, 1916. And at which time you are notified plaintiff will make application to said court for an order upon you to appear before said court at a time and place by it then to be set and submit to examination under oath touching property you may have within the State of Iowa not exempt and subject to said writ of attachment in said cause, which has been issued and under which the said C. B. & Q. Rd. Co. was summoned as garnishee as a supposed debtor of yours. At said hearing of September 16th, 1916, you are required to be, and should be present, both for your own protection and to avoid default being entered against you on such application. For further particulars see papers on file in the clerk's office in said cause and unless you appear thereto and defend before
51 noon of the second day of the next term being the October term of said Court, which will commence at Ottumwa, Iowa, on the 30th day of October A. D. 1916, default will be entered against you and judgment rendered thereon, in the principal cause, independent of the application for such order.

Dated September 2d, 1916.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

Return of Service.

STATE OF IOWA,
Linn County, ss:

Received the within notice this 4th day of September 1916 and on the 9th day of September A. D. 1916 I personally served the within named defendant, to wit American Refrigerator Transit Company by reading the original to U. G. Gruver, in his presence and hearing, he being the agent of said Company in Cedar Rapids, Ia., and delivered to him a true copy thereof. All done in Linn county, Iowa.

JOHN TAYLOR,
Sheriff of Linn County, Iowa,
By W. J. VOUDRACEK,
Deputy.

52 Document No. 13.

Attachment Writ.

Filed in State Court September 16, 1916.

STATE OF IOWA,
Wapello County, ss:

To the Sheriff of said County, Greeting:

Whereas, E. H. Emery & Company has filed its petition under oath, in the office of the Clerk of the District Court of said County,

stating that American Refrigerator Transit Company is justly indebted to it E. H. Emery & Company in the sum of six hundred twelve and 25/100 dollars and interest, covering damages caused by said A. R. T. Co. to car loads of fresh peaches consigned from Orchard Park, Texas, to said E. H. Emery & Co., in July and August, 1912, and asking a Writ of Attachment may issue against the Goods, Chattels, Lands, Tenements and Effects of said American Refrigerator Transit Company or so much thereof as may be necessary to secure the sum of Eight Hundred Dollars. Hon. C. W. Vermilion one of the Judges of the 2d Judicial District of the District Court of the State of Iowa in and for Wapello County having made an order on the 31st day of August A. D. 1916 allowing writ of attachment against said Company in the sum of $800.

Therefore these are, in the name of the State of Iowa, to command you to attach the Lands, Tenements, Goods, Chattels, Rights, Credits, Moneys and Effects of said American Refrigerator Transit Company wherever the same may be found in your county, or so much thereof as may be necessary to satisfy the above stated indebtedness, together with the costs of suit, and safely to preserve the same to be dealt with according to law. And make legal return of your doings in the premises to the District Court of said County on the first*y* day of the next term thereof, to be held at the Court House in Ottumwa, in said County on the 30th day of October A. D. 1916.

In Testimony Whereof I, W. T. Wilson, Clerk of said Court, have hereunto subscribed my name and affixed the seal of said Court at my office in Ottumwa, in said County, this 31st day of August A. D. 1916.

[SEAL.] W. T. WILSON,
Clerk.

Return of Service to Attachment Writ.

53 STATE OF IOWA,
Wapello County, ss:

The within Attachment Writ came into my hands on the 31st day of August A. D. 1916, and I hereby certify that by virtue of same, at the direction of plaintiff's attorney, C. W. Whitmore, I garnisheed the Chicago, Burlington and Quincy Railroad Company as per Notice a copy of which is hereto attached and made a part of this return. And I now return this Writ with these my doings in the premises. All done in Wapello county, Iowa.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa,
By J. A. BRIGHT,
Deputy Sheriff.

STATE OF IOWA,
Wapello County, ss:

I further certify that on the 12th day of September, A. D. 1916, by direction of said plaintiff's attorney I levied on and attached

American Refrigerator Transit Co.'s car No. 11483 which was standing on the tracks of the C., B. & Q. Railroad Company's in Ottumwa, Iowa, and I further certify that I appointed W. L. Dykes, freight agent for said railroad company as custodian and took his receipt for same, which said receipt you will find attached to and made a part of this return. And I now return this Writ with these my doings all done in Wapello County, Iowa.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa.

54 Document No. 14.

Notice to Garnishee.

Filed in State Court September 16, 1916.

In the District Court of the State of Iowa in and for Wapello County.

Law. #9643.

48/21.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY et al., Defendants.

To the Chicago, Burlington and Quincy Railroad Company:

You are hereby notified that you are attached as garnishee of the defendant American Refrigerator Transit Company in the above entitled cause, as a supposed debtor to the said defendant, and that you are required not to pay any debt due by you to the said defendant or hereafter to become due, and that you must retain possession of all property of said defendant, now or hereafter being in your custody or under your control in order that the same may be dealt with according to law.

And that by order of the Honorable C. W. Vermilion, presiding Judge of said court, made in open session, on August 31st, 1916, in said cause you are further required to be and appear before said court, in open session at the court room, in the court house, in the City of Ottumwa, Wapello County, Iowa, at nine o'clock in the forenoon of the sixteenth day of September, 1916, through your proper officer having charge of such matters, and answer under oath such interrogatories as may be propounded to you in open court by plaintiff to you as such garnishee, or you will be liable for the entire judgment which plaintiff eventually obtains against said American Refrigerator Transit Company.

That cars 11483 and 12338 of said American Refrigerator Transit Company are now empty and standing on your side tracks in Ot-

tumwa; and its car 13735 loaded with peaches consigned to E. H. Emery & Co., Ottumwa, is now on your track in said City.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa.

STATE OF IOWA,
Wapello County, ss:

The within notice to garnishee came into my hands on the 31st day of August A. D. 1916, and I hereby certify that on the
55 31st day of August A. D. 1916 at the direction of plaintiff's attorney, C. W. Whitmore, I served same on the Chicago, Burlington & Quincy Railroad Company by offering to read the same to W. L. Dykes, who is freight agent of said company which reading he waived and delivered to him a copy thereof. I further certify that I paid said W. L. Dykes $1.35 witness fee, which said plaintiff's attorney, C. W. Whitmore had paid to me. All done in Wapello County, State of Iowa.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa,
By J. A. BRIGHT, *Deputy.*

56 Document No. 15.

Notice of Levy of Attachment.

Filed in State Court September 16, 1916.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Notice to Defendant and Occupant.

To American Refrigerator Transit Company and Chicago, Burlington and Quincy Railroad Company:

You are hereby notified, that by virtue of an attachment issued by the Clerk of the District Court of Wapello County, Iowa, in the above entitled cause, to me directed, I have levied upon and executed as property of said defendant, the following property, refrigerator car number 11483 now on tracks of C., B. & Q. Railroad Company at Ottumwa, Iowa.

Whole amount of attachment, Eight hundred dollars ($800).

Witness my official signature this 12th day of September 1916.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa.

STATE OF IOWA,
Wapello County, ss:

I certify that on the 12th day of September, 1916, I personally served the within notice on the within named Chicago, Burlington & Quincy Railroad Company being in actual occupancy and possession of the within described personal property, by offering to read the same to W. L. Dykes, who is freight agent of said Company, which he waived, and delivered to him a true copy thereof. All done in Wapello County, Iowa.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa.

57 *Return of Levy by Sheriff under Attachment Writ.*

Filed in State Court September 16, 1916.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

I hereby certify that the annexed Attachment Writ came into my hands on the 31st day of August, 1916, at 11 o'clock A. M. and by virtue thereof on the 12th day of September 1916 at 11:30 o'clock A. M. I levied on the following described property as the property of the said defendant, towit: refrigerator car number 11483 now in the yards of the C., B. & Q. Railroad Company at Ottumwa, Iowa.

GEO. H. GILTNER,
Sheriff of Wapello County, Iowa.

Received 12th day of September 1916 of George H. Giltner, sheriff, the above described property for care and custody until further orders of the sheriff.

W. L. DYKES,
Agent C., B. & Q. Rd. Co., Custodian.

58 Document No. 16.

Motion to Dismiss.

Filed in State Court, September 7, 1916, by American Refrigerator Transit Company.

In the District Court of the State of Iowa in and for Wapello County.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Motion to Dismiss.

Comes now the above named defendant American Refrigerator Transit Company and moves the court to dismiss this cause and to grant defendant reasonable compensation for its trouble and expense in attending this cause, including reasonable attorney fees.

In support of this motion, defendant shows the court:

Originally another defendant, which, for the purposes of this suit, was a resident of Wapello County, Iowa, was joined with this defendant, but plaintiff has failed to secure judgment against said defendant and judgment has been rendered in favor of said defendant, so that now this defendant is the only defendant against which plaintiff may recover in this action.

Original notice in this suit was served upon this defendant in Linn County, Iowa, as shown by the return of service thereon.

Plaintiff alleges and this defendant admits that it is a corporation organized under the laws of New Jersey.

This defendant is a non-resident of the State of Iowa and a non-resident of Wapello County, Iowa, and has never maintained any office or agency in said Wapello County.

Said Wapello County never has been and is not for any reason, the proper county in which to bring this action against the defendant, save only as it was the proper county within which to bring the action against the co-defendant.

As a showing of facts in support of this motion, the defendant refers the court to the pleadings, evidence, record, opinion and judgment of the court in this cause and the affidavit Exhibit A"
59 attached hereto and by reference thereto makes the same a part of this motion.

McNETT & McNETT,
BRAMMER, LEHMANN & SEEVERS,
Attorneys for Defendant,
American Refrigerator Transit Company.

60 Document No. 17.

Opinion of Judge Vermilion, of the State Court.

Filed September 16, 1916.

In the District Court of Wapello County, Iowa.

Law. No. 9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9644.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9645.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9646.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9647.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Law. No. 9648.

E. H. EMERY & COMPANY, Plaintiff,

vs.

WABASH RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Opinion and Order.

61 The court having determined that the railway companies, defendants cannot be held liable in these actions, the defendant American Refrigerator Transit Company moves that the causes be dismissed as against it because it is a non-resident of Wapello County and served outside the County and cannot be sued therein.

The moving defendant is incorporated under the laws of another state. It was served in Linn county, where it maintains an office and agent. Except in the case against the Chicago & Great Western Railway Company it was in each of these actions joined as defendant with a railway corporation, resident of and properly suable in this county.

Section 3501 of the Code provides, in part:

"Personal actions, except as otherwise provided, must be brought in a county where some of the defendants actually reside, but if neither of them have a residence in the State they may be sued in any county in which either of them may be found."

Section 3502 is as follows:

"Where an action provided for in the preceding sections is against several defendants, some of whom are residents and others non-residents of the county, and the action is dismissed as to the residents, or judgment is rendered in their favor, or there is a failure to obtain judgment against such residents, such non-residents may, upon motion, have said cause dismissed, with reasonable compensation for trouble and expense in attending at the wrong county, unless they, having appeared to the action, fail to object before judgment is rendered against them."

Section 3497 is as follows:

"An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated.

As heretofore found, the defendant is not a common carrier, but it is insisted the 1st section quoted is not by its terms applicable only to common carriers, but applies to the owner of a line of cars, whether a common carrier or not, and it is insisted the defendant is such an owner of a line of cars and that they are operated in this County. The defendant owns refrigerator cars that are used by railroads in the transportation of perishable freight under refrigeration. By virtue of a contract with the initial carrier, it, in the State of Texas,

furnished the cars loaded and stowed the fruit in question, and furnished, directly or indirectly, the ice for the refrigeration of the same in transit. Under such contract it received the refrigeration charge and a percentage of the fre-ght charge and mileage on its cars. Its relation- with the defendant railway companies are not shown except
62 that some of the cars in question were hauled into the County by them a . i other cars of the defendant are, from time to time, so hauled into and through the County. The presence or movement of its cars here is without regularity. They are brought in occasionally and with varying frequency. The defendant has no tracks, motive power, office, officer, agent or employe in the County and the movement of its cars in the County is wholly under the control of the railway companies hauling them.

Under these circumstances I do not think it can be said the defendant was operating a line of cars in Wapello County. To hold that it was would be to say that the mere fact that its cars were occasionally brought into the County by the railway companies made it suable here, for there is no other fact in the record upon which such a conclusion can be based. Such a construction of the statute, would, it seems to me, lead to i-tolerable difficulties and situation. If one owner of cars that are brought into the County may be sued here because of that fact, it would seem all other owners must, under like circumstances, be subject to suit here. It is a matter of common knowledge that cars of one owner run over any line of railway where the demands of traffic take them and often entirely beyond the control of the owner. It is hardly conceivable that the purpose of the statute was to make all owners of cars liable to be sued in any county into which its cars might be hauled by any railway company, without regard to the intention, business or acts of the owner. If this be the meaning of the statute the inquiry arises as to how many cars must be here, and when, to confer jurisdiction. Does it depend on the presence of the particular car in controversy? If the presence of one car is sufficient, when, with respect to its presence, or for how long thereafter, would the owner be suable here? Any attempt to answer such questions brings the conviction that the statute cannot be construed as plaintiff contends.

Plaintiff further insists that section 3502 applies only to defendants who are residents of the State, though not of the County, and not to non-residents of the State. The statute-, however, make no such distinction, and it is not seen how the fact that, in addition to being a non-resident of the County, a defendant is also a non-resident of the state would affect the situation.

It is further contended that by a written stipulation as to the mode of trial the defendant waived the right to urge the motion
63 now made. The stipulation was merely as to the manner of trial and was made at a time when the defendant, by reason of being joined with residents (except in the Great Western case) was properly in court and bound to go to trial. The defendant then had no right to make the motion now pending, because plaintiff had not then failed to recover against the resident defendant.

In the Great Western case No. 9647, both defendants before answer, moved for a change of the place of trial. The motions were overruled, as I understand, upon the theory that plaintiff's allegation that the Refrigerator Company was a common carrier operating a line of cars in Wapello County was a question of fact to be determined on the trial. It has been determined adversely to plaintiff and the present motion should be sustained.

In the Burlington case, No. 9643, an attachment has been issued against the Refrigerator Company since the argument on the motion, which, it is understood, is claimed to affect the question. The ruling on the motion in that case is reserved.

In the other cases the motion to dismiss will be sustained.

Dated September 16, 1916.

C. W. VERMILION,
Judge.

64 Document No. 18.

Opinion, Order, and Judgment Filed and Entered in State Court October 14, 1916, *by Judge Vermilion, Dismissing as to American Refrigerator Transit Company.*

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

In the memorandum heretofore filed in this and other like cases, sustaining the motion of the American Refrigerator Transit Company to dismiss, the ruling in this case was reserved. In this instance before the actual filing of the motion to dismiss, though after the argument upon the question raised thereby, plaintiff filed a separate supplemental petition, alleging that the Refrigerator Company is a non-resident corporation and asking that a writ of attachment issue against its property. Upon the writ so issued property of the defendant was levied upon and the Chicago, Burlington and Quincy Railroad Company garnisheed as a supposed debtor of the defendant.

It is claimed that by this attachment, levy and garnishment the Court acquired such jurisdiction in rem as that the defendant is not entitled, as it would otherwise be, to have the personal action theretofore pending against it dismissed, because the resident defendant having been dismissed, this defendant was sued in the wrong county. While the question thus presented has some rather puzzling aspects, it would seem that it is controlled by Section 3877 of the Code, which provides:

"If it (the issuance of the attachment) be subsequent to the commencement of the action, a separate petition must be filed and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto."

If, as there provided, the attachment, when sued out subsequent to the commencement of the action, is to be deemed independent of, and only auxiliary to, the main cause, I am unable to see how it can confer jurisdiction to render a judgment upon a trial previously held and where, independent of the attachment, the judgment could not be rendered because of the failure of the personal jurisdiction. The jurisdiction in rem acquired under the attachment cannot, I
65 think, operate to give effect to the trial had before it was acquired and which, independent of the attachment, must fail of effects because of the defendant's being required to appear in the wrong county.

The motion to dismiss will be sustained.

The defendant will be allowed $300 for being required to appear in the wrong county, devided equally among the six cases.

Dated October 2, 1916.

C. W. VERMILION,
Judge.

66 Document No. 19.

Judgment of the State Court Made September 18, 1916, *and Entered of Record October* 16, 1916.

Law. #9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendants.

Judgment.

This cause coming on to be heard in open court this eighteenth day of the August 1916 term, counsel for the various parties being present, and the different matters having been fully argued and considered, the court does now order, adjudge and decree:

Plaintiff's motion for new trial against the defendant Chicago, Burlington & Quincy Railroad Company is hereby overruled on each and every ground thereof, to which ruling plaintiff at the time duly excepts.

Motion of said defendant railroad company to strike amendments to petition filed July 14th, 1916, and August 19th, 1916, are hereby overruled and said defendant excepts.

As to said defendant the Chicago, Burlington & Quincy Railroad Company, the court finds for it upon the merits of the cause, and upon such merits hereby dismisses said defendant hence with its costs, and judgment for such costs is hereby entered in favor of said Chicago, Burlington & Quincy Railroad Company in the sum

of $119.80, to which finding, ruling and judgment plaintiff at the time duly excepts.

Plaintiff's resistance to motion of the defendant American Refrigerator Transit Company to dismiss the action as to said defendant is hereby overruled, on each and every ground, to which ruling plaintiff at the time duly excepts.

Subject to the writ of attachment of this court heretofore issued and under which the Chicago, Burlington & Quincy Railroad Company stands as garnishee in default, the motion of said defendant American Refrigerator Transit Company to dismiss the action as to it is hereby sustained under and by virtue of the pro-
67 visions of section 3502 of the Code, and upon such ground only; and said defendant is hereby dismissed (as to the personal action but not as to said proceeding in rem) from said cause, upon the opinion of the court filed herein October 14th, 1916, made part hereof by reference; to which ruling plaintiff at the time duly excepts. Such dismissal is without prejudice as to the merits of the action as between plaintiff and said defendant. The court finds and adjudges that the failure of plaintiff to prevail herein as against said defendant is not because of any negligence in its prosecution. To that portion of the order embraced in the last two sentences each defendant excepts at the time.

Costs of said action to this time accrued other than those taxed in favor of said Chicago, Burlington & Quincy Railroad Company, are hereby taxed against plaintiff in favor of said American Refrigerator Transit Company, and in addition thereto the sum of fifty dollars ($50.) as the reasonable compensation for trouble and expense of said defendant in attending at the wrong county, said attorney fees to be taxed in favor of Brammer, Lehmann & Seevers; making total costs in the sum of $119.80 as against plaintiff in favor of said defendant, said judgment for which sum is hereby entered in favor of said American Refrigerator Transit Company against said E. H. Emery & Company, to which ruling and judgment plaintiff at the time duly excepts. Defendant at the time excepts to the action of the court in not taxing attorney's fees and compensation in an amount in excess of $50, and plaintiff excepts to the taxing of any such fee.

As to the proceeding in rem based upon said writ of attachment and garnishment, the court still retains jurisdiction of same and of the defaulted garnishee the Chicago, Burlington & Quincy Railroad Company, so far as the claims of plaintiff against said American Refrigerator Transit Company are concerned, and as to which plaintiff is given until October 19th, 1916, to file petition herein, due notice of which and of said garnishment shall by plaintiff be given said American Refrigerator Transit Company. To which defendant excepts.

C. W. VERMILION,
Judge.

Recorded in District Court Record No. 44 at page 51.

68 Document No. 20.

Substituted Petition.

Filed in State Court October 16, 1916.

In the District Court of the State of Iowa, in and for Wapello County, October, 1916, Term.

Law. #9643.

47/21.

E. H. EMERY & COMPANY, a Co-partnership, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Defendant.

Substituted Petition.

Damage Action in Rem—Not Personal.

For cause of action plaintiff states:

First Theory.

Ex contractu.

1. That during the times involved plaintiff has been and is now a partnership composed of E. H. Emery and W. W. Copeland; engaged in conducting a wholesale fruit business, with its principal place of business in the City of Ottumwa, in this county.

2. That defendant during such times has been and is now a corporation, organized and existing under the laws of the State of New Jersey.

3. That defendant has never registered under the laws of this State or obtained a license or permit to transact business in this State as required by #1637 et seq. of the Iowa code.

4. That defendant is a foreign corporation, and acting as such.

5. That defendant is a non-resident of the State of Iowa.

6. That during 1912 defendant operated railroad refrigerator cars on the line of the Missouri, Kansas & Texas Railway Company of Texas, and other railway lines throughout the country, under contract between it and such companies, a copy of which is made part hereof as Exhibit "A," reading in part as follows:

"(1) The "Refrigerator Company" agrees to handle the fruit, melon, and vegetable shipments originating on the lines of the "Katy."

"And furnish material and labor as provided for in Tariff mentioned, when such shipments are destined to interstate points."

"It being understood and agreed that the refrigerator
69 charges on shipments destined to interstate points, when loaded in cars owned, operated or controlled by either of the parties to this agreement shall accrue to the "Refrigerator Company."

(2) The "Katy" agrees to pay to the "Refrigerator Company" twelve and one half per cent (12½) of the "Katy" freight revenue, exclusive of switching, bridge tolls and other terminal charges on cars furnished by the "Refrigerator Company" on shipments destined to interstate points.

(5) The "Katy" agrees to apply all of the refrigerator equipment owned, operated or controlled by them in the handling of the shipments covered by this agreement and the "Refrigerator Company agrees to furnish the additional refrigerator equipment required to handle said shipments as provided in paragraph 13 hereof."

"(13) The "Refrigerator Company" shall hold itself accountable to the "Katy" for any failure on its part to properly ice and reice as aforesaid such refrigerator cars furnished and supplied under this contract, including "Katy" refrigerator cars furnished and supplied under this contract, including "Katy" refrigerator equipment, and for any failure on its part to furnish as aforesaid sufficient number of suitable cars up to 600 refrigerator cars and as many more as they are liable to furnish for transportation of fruits, melons, and vegetables to move under refrigeration in carloads from stations on the lines of the Katy."

"In case of recovery from the "Katy" in legal proceedings of any claim or claims for damages arising from the causes above mentioned the "Refrigerator Company" shall reimburse the "Katy" and pay to it the amount so recovered from it for such damages; provided, however, that the "Refrigerator Company" shall be afforded an opportunity during the trial of any suit or action to be heard in defense of its interests therein, and the "Katy" and "Refrigerator Company" shall co-operate in bringing to a favorable termination any such litigation, and provide further, that the "Refrigerator Company" shall not be precluded, by reason of any such judgment entered against the Katy" in any such suit or action, or by reason of its participation therein, from showing subsequently thereto in any proceeding between itself and the "Katy," that it did not cause the damage which resulted in such judgment."

7. Said contract, here identified as Exhibit 1 of this petition, and the original B./L. for each car involved, the governing
70 tariffs, and all documentary evidence herein referred to (except a letter from plaintiff of June 11, 1912) are on deposit with the clerk of this court as exhibits in cases 9643 to 9648 between the same parties and involving the same cars and shipments, where they are subject to reference by defendant. Because of the length of the documents, and as they comprise some 300 exhibits, same are too voluminous to herein set forth.

8. Plaintiff now affords the "Refrigerator Company" the present

opportunity of being heard in defense of its interests, stipulated for in said contract.

9. That defendant was not a party to any of the governing tariffs.

10. The aforesaid "Katy" line was a party to same. "Local and joint Refrigeration Charges Tariff No. 4196D" of said Company effective July 1st, 1912, and duly filed with the Interstate Commerce Commission, provided for a refrigeration rate of 27½¢ cwt. on fresh peaches from Texas points to all Iowa points.

Rule 3 thereof reading: "Refrigeration charges published herein cover entire cost of refrigeration from point of origin to destination. Shippers must not furnish icing of cars without consent of this company."

Rule 8 thereof reading: "No instructions from shippers as to icing or re-icing are necessary on commodities subject to this tariff."

Rule 10 thereof reading: "Carriers will examine bunkers daily, filling to capacity when tanks get below one-half full, making record of each re-icing separately, showing date, hour and quantity of ice furnished."

And Rule B, Item 15, thereof reading: "The charges for refrigeration shown herein from stations in Texas cover and include the cost of stowing, stripping and bracing of freight and material of the following dimensions, ¾ inch by ¾ inch eight feet long for stripping, and two inch by four inch material of sufficient length for bracing packages requiring such material."

11. That during the season of 1912 plaintiff was the owner of the peaches raised on the large orchard known as the Gidcomb orchard, at Orchard Park siding, Chatterton station, on the line of said "Katy" system; the fair and reasonable market value of said peaches there, and the actual contract price for said entire orchard being 67½¢ bu.; the fair and reasonable market value
71 of said peaches at destination being towit $1.50 per bu. basket.

12. That all of said peaches were in good, firm, sound merchantable condition when delivered to defendant at the car door there; and with reasonable care in loading, stowing and icing, would have arrived at destination in like condition and value of $1.50.

13. Anticipating the peach movement of 1912, and pursuant to the general custom of defendant in handling its business, plaintiff, on June 11th, 1912, wrote defendant ordering from it the equipment for such movement. Plaintiff has no record of the contents of this letter; and, so far as it nows, the original is in the possession of defendant, who is called upon to set it up in its answer and to produce the original at the trial, failing wherein plaintiff will offer secondary evidence thereof.

14. Defendant accepted such order from plaintiff and thereby contracted with plaintiff to furnish such equipment, stowing and refrigeration services and material. Such acceptance being by letter to plaintiff from said defendant E. W. Rice, its general freight agent at St. Louis, dated June 14, 1912, reading:

"Replying to your letter of the 11th instant to Freight Claim

Agent Weiler, advising that you have purchased an orchard at Chatterton switch, a point on the M. K. & T. in Texas, and expect to ship 100 cars of peaches, and desiring to know with whom you should take up regarding freight equipment, billing, etc. All that is necessary for you to do is to take up in the usual way with the Agent at Chatterton, placing orders for cars, etc. If you will advise the name of your representative, I will be glad to refer same to the M. K. & T. traffic department in Texas, who will no doubt have their Mr. Chatham, who is in charge of that territory, call on him and explain the arrangement for handling."

15. The defendant thereby making said "Katy" system its agent to receive from plaintiff orders for each individual car, to be furnished by defendant upon such order. The cars involved were so ordered and furnished.

16. Acceptance of such order by defendant being further evidenced by letter of its T. H. Gorman, its general freight agent, at Tyler, Texas, to plaintiff, of date June 14th, 1912, reading:

"Replying to your favor of the 11th inst. beg to advise that we will handle all of the shipments originating on the M. K. & T. Railway this season, but will not furnish all of the equipment as may be necessary to handle the business. The cars will be initial iced at Shreveport and re-iced at Chatterton either from ice sent out in the bodies of the cars, or, if necessary, can ship some carload ice to that point to do the re-icing.

"It is my understanding that the M. K. & T. has an agent now at Chatterton who will be located there during the peach movement."

72 17. The aforesaid arrangement was confirmed by said "Katy" system by letter of its Industrial Agent Mr. T. L. Peeler, at Dallas, Texas, to plaintiff under date June 17th, 1912, reading:

"We have made arrangements with the A. R. T. Co., who will furnish us cars this year for the handling of all fruit and vegetables moving under refrigeration. Mr. F. E. Gorman, at Tyler, Texas, is the general agent of the A. R. T. Co., and I understand he has a man by the name of Cobb located at Greenville, who will personally supervise the handling of this fruit and truck on our Shreveport division."

18. By the aforesaid tariffs the "Katy" system obligated itself for the freight and refrigeration charges specified" to haul the cars to destination, under its B./L. and the Carmack amendment to the interstate commerce act; and "to furnish material and labor as provided for in said Tariff" as heretofore recited, the material and labor recited meaning the lumber and labor for stowing, and the ice and labor for refrigeration.

19. The defendant in turn, by its contract Exhibit 1, with the "Katy" system, agreed to furnish the refrigerator equipment and

perform the carriers' duties of furnishing the lumber and labor for stowing, and the ice and labor for refrigeration.

20. As plaintiff required the cars in which to load the peaches, it ordered the cars from the agent of the "Katy" system at Chatterton, as instructed by defendant in its letters heretofore set forth. The defendant in turn accepted such orders for the cars involved, and actually furnished the same, on such orders from plaintiff. The peaches involved were by defendant actually loaded in the cars so actually furnished by it. By so accepting plaintiff's order for each individual car, and by assuring plaintiff it would perform the icing services required in connection with same, privity of contract and dealing was established between plaintiff and defendant. The orders for the cars were given verbally. They were given to the local agent at Chatterton of said "Katy" system. They were given by plaintiff's agent, T. M. Boles. The name of said local agent of the "Katy" system, so far as known to plaintiff, was R. L. Cook. The orders were given the day before the cars were furnished.

And plaintiff, by such assurances from defendant, and from said "Katy" system was induced to and did believe, and relied thereon, that he was dealing with defendant for such services; that it would furnish the cars, and do the stowing, and furnish the ice and icing services initially, at point of loading and en route.

21. That plaintiff paid such refrigeration charges, to wit:
73 some $60 on each car, over and above the transportation haul, such payment being to the carrier at destination for and on account of defendant, who received and accepted same from such terminal carrier; that the refrigeration charges so paid were in addition to the freight charges of from $100 to $130 on each car also paid by plaintiff, and of which latter the defendant received its share of 12½% from the "Katy" proportion.

22. That plaintiff delivered to and defendant actually received at the car door all of the peaches involved; and defendant actually furnished the refrigerator car equipment for the transportation of same; and defendant actually stowed all of said peaches in the cars; and defendant, through the carriers (whom it paid for such service) actually furnished the ice and icing services for said cars en route to destination; all pursuant to the aforesaid contracts defendant entered into with the "Katy" system and with the plaintiff for such service.

23. That implied covenants of such contract were that defendant would furnish suitable cars for the service; would see that the baskets were properly stowed in the car; and would see that the car was chilled by initial icing, and tanks filled at time of loading, and kept supplied with sufficient ice en route to preserve the fruit.

24. That defendant breached such implied covenants by furnishing cars with ice bunkers so small as not to hold sufficient ice to refrigerate the fruit and preserve it en route; by furnishing insufficient and defective material for the stowing; by employing inexperienced and incompetent men to do the stowing and bracing; by requiring the work to be done by an inadequate force of men; by letting the cars with the peaches start from destination with the

bunkers holding insufficient ice to preserve same to the next icing station; by permitting the tanks or bunkers to become so depleted in transit as to permit the fruit to soften, ripen and decay; by not reicing said cars when the bunkers got below one-half full as required by said tariff.

25. By reason whereof the peaches were caused to be mashed, jammed, crushed, leaky, bruised, spotted, heated, cooked, overripe, soft, decayed and rotten.

26. That plaintiff was in the exercise of reasonable care on its part in the picking, packing and handling on its part of the peaches involved, and was without negligence contributing in any de-
74 gree to the damage and loss incurred.

27. That such damage was occasioned by the failure on the part of defendant to exercise a reasonable degree of care to see that the cars it furnished were suitable by having tanks or bunkers of adequate size; to see that the material furnished for bracing was not defective and that sufficient of it was used and used in the right place and manner; to see that men of experience stowed the peaches in the car; to see that the car was chilled by having the bunkers filled the day before the car was loaded; to see that the fruit hot from the summer orchard was chilled in the car at the time of loading by having the bunkers filled with ice; to see that the icing stations were at such intervals as to afford opportunity to fill the bunkers with ice as they became depleted in transit; to see that sufficient ice was furnished en route to keep the fruit chilled and preserve the same; all of which constituted breach of implied and express covenants assumed by defendant in its contracts with the "Katy" system and plaintiff aforesaid.

28. That at the time the peaches were delivered by plaintiff to defendant at the car door at Orchard Park, plaintiff, through T. M. Boles, protested, by telephone, to defendant, through the said Mr. Gorman, and the said Mr. Cobb as to the small ice capacity of the tanks, and of the small tanks being dangerously depleted at the time the shipments left, and of the inadequate force of men furnished by defendant to handle the stowing and icing, of their inexperience and incompetency and of their failure to properly stow the fruit; and further protested by telegram from and to the same parties at the same time, which telegrams, so far as plaintiff knows, are in possession of defendant, who is hereby notified to produce same at the trial, failing in which secondary evidence of same will be offered.

29. That herein following plaintiff shows:

1. The date in July, 1912, plaintiff delivered the baskets of peaches to defendant at the car door at Orchard Park, when and where defendant so received and accepted same, having a man inspect their condition at the time, making his report to defendant on its form 251 "Fruit Loaders' Daily Report," showing also the condition of the car and of the ice in the bunkers.

2. The number of the car so furnished by defendant and in which it stowed the said peaches.

75 3. The point of delivery of the car.

4. The railroad delivering same.

5. The date of delivery.

6. The number of bushel- worthless at point of and at time of delivery because of their aforesaid damaged condition.

7. The sorting charges plaintiff paid to sort the worthless from those peaches which by such sorting could be made marketable; and without which sorting all the peaches would have been unmerchantable. The sorting was done by laborers employed by and paid by plaintiff. And the amount so paid and shown was the fair and reasonable value of such services. The sorting was done at point of delivery; at plaintiff's fruit house in Ottumwa; elsewhere in the car; by men whose names are unknown to plaintiff.

8. The fair and reasonable value of ice furnished by plaintiff wherewith to fill the depleted bunkers at time of arrival of the cars. The peaches were in such damaged condition they could not be sold without sorting, which took considerable time. The ice in the bunkers was so low on arrival as not to afford chilling capacity during such interval. And to preserve the fruit meanwhile as best it could be preserved, in its crushed and rotten condition it was necessary for plaintiff to purchase ice and fill the bunkers, which it did, the value of the ice so furnished being shown as well as the quantity furnished, in pounds; the fair and reasonable value of same being $2 per 2000#. Had defendant properly performed its contract and duty in the premises it would not have been necessary to furnish such ice, and the cars would not have been delayed and thereby subjecting the peaches to further decay, had sorting been not so made necessary.

Date.	Loaded.	Car number.	Destination.	Railway arrival.	Date arrival.	Bu. lost.	Sorting.	Total damages.
			Count 1.					
15	M. K. & T.	3144	Osceola, Iowa	C. B. & Q.	19 Ice	31 3000#	$3.00	$49.50
			Count 2.					
15	M. K. & T.	3395	Albia, Iowa	C. B. & Q.	20	16	....	22.50
			Count 3.					
15	M. K. & T.	3314	Bethany, Mo.	C. B. & Q.	18	57½	....	86.25
76			Count 4.					
15	M. K. & T.	3352	Leon, Iowa	C. B. & Q.	19	19	4	$6.00
			Count 5.					
18	M. K. & T.	3079	Lacona, Iowa	C. B. & Q.	22	30	....	45.00
			Count 6.					
19	M. K. & T.	957	Albia, Iowa	C. B. & Q.	25 Ice	255 3000#	$8.00 3.00	258.50
			Count 7.					
19	M. K. & T.	3028	Albia	C. B. & Q.	25	44	8.00	74.00

Count 8.

From Neches, Texas, on the line of the International & Great Northern Railroad Company, with which Company (as plaintiff is informed and believes and charges the fact to be) defendant had contract similar to that with the "Katey" system, Exhibit 1 set forth 17; Erie, 62,922; Chariton; C., B. & Q.; 25; 51; 76.50.

30. That plaintiff is the owner of the aforesaid claims, and no part of same has been paid.

31. That in the litigation in paragraph 7 hereof mentioned defendant was on October 14, 1916, dismissed from similar actions, because sued in the wrong county by reason of joinder of the delivering carriers on the same cause of action in a county other than that in which notice had been served on defendant. That the failure of plaintiff therein was not due to any negligence on its part in prosecution of same, and this court therein so expressly adjudged.

32. Wherefore plaintiff prays judgment, separately, against defendant, on each count, in the amount of the total damages shown on each count, together with interest thereon at 6% per annum from the date of arrival of each car, together with costs; and for the writ of attachment of this court against the property of defendant, under each theory herein.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

77 Second Theory.

Ex Contractu.

Assumption of Liability by A. R. T. Co.

For separate cause of action on each count plaintiff re-avers each of the allegations hereinbefore set forth; and charges that under and by virtue of the aforesaid contract, Exhibit 1, more especially of paragraph 13 *13* thereof, defendant expressly assumed the liability of the "Katy" system. That said system, as the initial carrier, under the Interstate Commerce Act, was liable for such damages, whether occurring on its own line or that of a connecting or delivering carrier, or through the fault of defendant; and by virtue of such assumption of liability by defendant plaintiff has the same right of action against it as it would have against said M., K. & T. Ry. Co. of Texas.

Wherefore plaintiff has been damaged etc. and prays judgment against defendant on each of said eight counts, separately for the total damages so recited as to each count, together with interest from date of delivery of each car, and costs.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

78 Third Theory.

Ex Contractu.

Partnership.

For separate cause of action against defendant plaintiff re-avers each of the allegations recited as the first theory herein, and charges that under and by virtue of the provisions of said contract Exhibit 1 between defendant and the "Katy" system, and the refrigerator company participating to the extent of 12½% of the "Katy's" proportion of the tariff hauling revenue in the interstate shipments herein involved, and all other inter-state refrigerator business originating on the "Katy" system, the defendant taking the interstate refrigerating revenue, and the "Katy" taking the balance of the transportation revenue, the refrigerator car company participating likewise in the losses on the refrigerator car traffic so jointly handled, the said refrigerator car company defendant and M., K. & T. Ry. Co. of Texas were partners in the handling of the traffic in question.

Wherefore plaintiff has been damaged etc. and prays judgment against defendant on each of said nineteen counts, separately, for the total damages so recited as to each count, together with interest from date of delivery of each car, and costs.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

79 Fourth Theory.

Ex Contractu.

Estoppel.

For separate cause of action against defendant plaintiff re-avers each of the allegations recited as to the first theory hereinbefore set forth.

And in addition thereto:

30A. That by long course of dealings in similar matters between plaintiff and defendant extending over several years it was the general custom for plaintiff to present claims of this nature to the defendant company as principal for itself and as agent for said "Katy" system and not against the railroad companies, and this plaintiff was instructed by defendant, through its freight claim agent, Mr. Weiler, to do, by verbal instructions, towit, the latter part of 1910; defendant not requiring that such claims be presented in any specified length of time.

30B. That accordingly, August 7, 1912, plaintiff wrote to defendant as follows:

"I regret to inform you that we will have some heavy claims against your company for insufficient icing and the use of meat cars in place of fruit cars for handling our peaches from Texas as well

as Arkansas. We are making our records clear and giving you this advance notice that we will file claim for every A. R. L., S. R. L. and N. C. L. cars used in the movement of our peaches. I regret to do this, but, of course, I would prefer their arriving in good condition. I desire to give you this advance notice and in these claims there will be no compromising. I have compromised these matters for the last time.

Please advise me whether or not I will file claim with the delivering lines direct or with your office when properly made up. If I remember correctly, we filed them two years ago with the delivering lines, which required unnecessary time and investigation. Please instruct me what I shall do in this case, for if I remember correctly, we had to withdraw the papers from these lines and turn them over to your company direct.

Yours truly,

E. H. EMERY & CO."

On August 27, 1912, defendant, through its freight claim agent, L. Weiler, at St. Louis, wrote plaintiff:

"Referring to your letter of the 15th inst. having further reference to claims that you anticipate filing on recent shipments of peaches.

"Desire to state that it is my desire to assist you in every way possible with a view of having any claim that you may file properly and promptly disposed of, and while these claims ordinarily should be filed with the carriers, it may be that I can handle more promptly by having same filed with this office direct. You may therefore send your claims to me and they will be thoroughly investigated and disposed of at as early a date as possible.

With personal regards, beg to remain,

Yours very truly,

L. WEILER,

80 *Freight Claim Agent, A. R. T. Co.*

30C. That relying upon this general course of conducting their business, and these instructions from Mr. Weiler, plaintiff did as instructed; sent his claims to said freight claim agent and not to the railroad companies. Plaintiff did this believing defendant was acting in good faith and would investigate and handle said claims on their merits; and, relying upon these assurances, this general course of transacting such matters, and as to change in which defendant had given plaintiff no notice, and such instructions, plaintiff refrained from presenting his claims to the carriers and sent them to defendant. In the litigation in paragraph 7 referred to the said carriers have been adjudicated not liable to plaintiff in the premises solely because of failure on the part of plaintiff to present such claims to them. And plaintiff has been so prejudiced solely by reason of the aforesaid conduct of plaintiff.

30D. The claim on the car M. K. & T. 3390 involved in the first count was by letter of plaintiff to defendant at St. Louis, of date November 23, 1912, reading:

"We enclose herewith our claims #1 for $117.50 to cover loss sustained on car peaches M. K. & T. 3390 originating at Orchard Park, Texas, July 13, 1912, and arriving in Ottumwa on the C. M. & St. P., July 16, 1912.

This claim is based upon the fact that the car was improperly loaded by your company at the loading station, the fruit was mashed and decayed, the baskets turned upside down, the peaches spilled all over the car floor. The reason for this loss was that the car was not properly braced when loaded, was loaded by incompetent men, and, also on account of insufficient icing at loading station, and en route, and the small ice tanks used in these refrigerators. Attached to this claim is the original expense bill, upon this expense bill is a notation made by the agent of the delivering line, the original B/L, our invoice, and the invoice to our company.

Please give this immediate settlement.

Yours truly,

E. H. EMERY & CO."

30E. The original paid expense bill of the C. M. & St. P. Ry. Co. for said car bore notation: "Car arrived under ice ¾ full; 50 baskets lids off, some bottom up; peaches on car floor." This originial document, together with the other papers recited, was so enclosed to defendant.

30F. Under date December 17, 1912, defendant sent postal card to plaintiff reading, as to said claim:

American Refrigerator Transit Company, Claim Agent's Office.

St. Louis, Mo., 12/17/1912.

Dear Sir: The following claims have been this day received:

No. 31796.

81 If future correspondence is necessary please refer to our claim number.

Yours truly,

L. WEILER,
Freight Claim Agent."

And retained all of the original papers enclosed with plaintiff's letter of transmittal.

30G. Substantially similar letters were sent to defendant about the same time as to each of the cars and counts involved; and were handled by defendant in the same way.

30H. Considerable correspondence was conducted with reference to same between defendant and plaintiff; defendant calling for considerable more information as to which plaintiff furnished same. The correspondence is voluminous and is on deposit with the clerk of this court.

30I. That defendant was not acting in good faith in instructing plaintiff to send its claims to defendant; defendant has not in good faith investigated and passed upon the same on their merits; that

defendant was, on the contrary, actuated by motives of attempting to mislead and deceive plaintiff into position of reliance upon belief it was acting in good faith and would investigate and pass upon the claims on their merits, when in fact its only purpose was an effort to obtain some technical advantage whereby it could defeat the same.

30J. Whereby defendant has assumed liability; and has, by its aforesaid conduct, induced plaintiff to rely upon its good faith and assurance that the papers constituted claims properly made out and which would be fairly investigated and passed upon their merits pursuant to the instructions and assurances of defendant and the previous general course of business prevailing between them; and because whereof defendant is now estopped to deny its liability in the premises.

Wherefore plaintiff has been damaged etc. and prays judgment against defendant on each of said nineteen, counts separately, for the total damages so recited as to each count, together with interest from the date of delivery of each car, and costs.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

82

Fifth Theory.

Ex delicto.

Mis-feasance.

For separate cause of action against defendant plaintiff re-avers each of the allegation contained as the first theory herein, and charges that, as agent for the M. K. & T. Ry. Co., of Texas, defendant caused the damages in question when it furnished cars having ice tanks of insufficient capacity to carry the shipments involved; when it employed men inexperienced in stowing such freight in the cars; when it used defectively and insufficient de*k*cing and bracing to support and hold the baskets from crushing and shifting while in the car in transit; when it undertook to and did do the icing of the cars initially and en route to destination but failed to see that the tanks were kept sufficiently full to preserve the fruit; and when it permitted the bunkers to run below half full, contrary to the tariff provisions; and when it permitted the cars to leave Orchard Park with the bunkers practically empty, when, in its correspondence, it had assured plaintiff cars would be re-iced at that point. That these acts of commission constituted misfeasance on the part of defendant of the duties it owed to its principal the M. K. & T. Ry. Co. of Texas, and to the public at large, and by reason whereof plaintiff was damaged as aforesaid.

Wherefore plaintiff prays judgment against defendant on each of said eight counts, separately, for the total damages so recited as to each count, together with interest from date of delivery of each car, and costs.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

83 Sixth Theory.

Ex Delicto.

Tort.

For separate cause of action against defendant plaintiff re-avers each of the allegations contained as the first theory herein, and charges that, independent of any privity of contract between plaintiff and defendant, the act to regulate commerce, in section 1, defined "transportation" as including cars and all services in connection with the refrigeration or icing of property transported and made it the duty of carriers subject thereto to furnish such transportation. Defendant was not, as the owner, lessee or lessor of refrigerator cars, subject to said act. The "Katy" system, however was subject to said act; and submitted thereto by filing its aforesaid tariffs with the interstate commerce commission. The duties thus imposed by law upon said "Katy" system, the defendant, as to the extent of furnishing the refrigerator cars, the ice and icing therefor, and the material and labor for stowing, assumed by the aforesaid contract Exhibit 1, and thereby became charged with a public duty to exercise a reasonable degree of care to see that the cars it furnished were suitable, and in performing the stowing and refrigeration services; and for its failure in these respects is directly answerable to plaintiff for the damages so sustained by it, in tort.

Wherefore plaintiff prays judgment against defendant on each of said eight counts, separately, for the total damages so recited as to each count, together with interest at 6% per annum from date of delivery of each car, and costs.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

84 *Interrogatories.*

Under and by virtue of the provisions of sections 3604 et seq. of the Iowa code plaintiff annexes the following interrogatories addressed to defendant and requires it to answer same under oath as by law provided.

1. Did you receive letter from plaintiff dated June 11th, 1912, referred to in letter of your Mr. Rice and your Mr. Gorman recited in paragraph 14 of the petition herein?

2. If so, attach copy thereof to your answer.

3. Is the copy you set up a copy of each letter so referred to by each of said gentlemen?

4. Did you have a man at Orchard Park or Chatterton or vicinity examine for you the cars and fruit in question?

5. Did he make report to you—a "Fruit Loader's Daily Report"—on your form 251 as to condition of car, ice and fruit?

6. On what cars involved were such or similar reports made to you?

7. By whom?
8. And when?
9. Set up copy of such report as to each car.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

STATE OF IOWA,
Wapello County, ss:

I, E. H. Emery, being first duly sworn, on oath state that I am a member of the plaintiff firm, and authorized by it to make this affidavit and do so on its behalf; that I have read the foregoing petition, am familiar with the facts therein recited, through the evidence offered at the previous trial therein mentioned, and that the statements in said petition contained are true as I verily believe.

That I have read the foregoing interrogatories, and I verily believe the subject of same is in the personal knowledge of the defendant and that answers thereto, if truly made from such knowledge, will sustain plaintiff's petition in whole or in part.

E. H. EMERY.

85 Sworn to before me by the said E. H. Emery this 16th day of October A. D. 1916.

[SEAL.] CHESTER W. WHITMORE,
Notary Public in and for Wapello County, Iowa.

86 Document No. 21.

Petition for Removal.

Filed in State Court October 31, 1916.

In the District Court of the State of Iowa, in and for Wapello County.

Law. No. 9643.

48/21.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Petition for Removal.

Comes now the American Refrigerator Transit Company and makes petition to remove this suit to the Ottumwa Division of the Southern Federal Judicial District of the State of Iowa and in support of this petition shows this Court:

There is a controversy between E. H. Emery & Co. and this petitioner and said E. H. Emery & Co. has filed a suit against this petitioner in the District Court of the State of Iowa in and for Wapello County, the same being suit No. 9643 Law in said Court.

Said suit is a suit of civil nature in which E. H. Emery & Company is the only party plaintiff and this petitioner is the only party defendant.

This petition is filed and presented before this petitioner is required by the laws of the State of Iowa or the rule of this court to answer or plead to the declaration of plaintiff.

At the time of filing of said suit, at all times since and at the present time, E. H. Emery & Co. was and is a partnership, composed of E. H. Emery and W. W. Copeland.

Said E. H. Emery at all said times was and is a citizen of Ottumwa, Wapello County, Iowa, and a resident and citizen of the Ottumwa division of the Southern Federal Judicial District of said State of Iowa.

Said W. W. Copeland at all said times was and is a resident and citizen of the State of Iowa and of the Southern Federal Judicial District of said State.

Said partnership at all said times had and has its principal place of business at Ottumwa, Wapello County, Iowa, and in the Ottumwa division of the Southern Federal Judicial District of the State of Iowa, and was and is a resident and citizen of said county and state and of said Ottumwa division of the Southern Federal Judicial District of the State of Iowa.

87 This petitioner, the American Refrigerator Transit Company at all said times was and is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and was and is a citizen of the State of New Jersey.

There is a controversy in said suit between plaintiff, a citizen of Iowa, and the defendant, a citizen of New Jersey.

Said suit is a suit and proceeding of civil nature arising under a federal law regulating interstate commerce and is not a suit or proceeding exclusive jurisdiction of which has been conferred upon the Commerce Court and this petitioner, the American Refrigerator Transit Company, defendant in said suit, is not a railroad company or other corporation or person engaged in or carrying on the business of a common carrier.

A bond in the sum of $1,000, conditioned as required by law is herewith presented for the approval of this court and this petitioner prays this court to proceed no further herein except to make an order for the removal of this case to the District Court of the United States for the Southern District of Iowa, Ottumwa division, at Ottumwa, and to accept said surety and bond and to cause the record herein to be removed to said District Court of the United States.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for the Petitioner.

STATE OF MISSOURI,
City of St. Louis, ss:

I, J. P. Finkenaur, being duly sworn, upon my oath state that I am the Secretary and Auditor of the American Refrigerator Transit Company, petitioner herein, that I have read the foregoing petition and have personal knowledge of the facts therein set forth and that the statements therein are true.

J. P. FINKENAUR.

Subscribed and sworn to before me by the said J. P. Finkenaur this 26th day of October A. D. 1916.

[SEAL.] J. C. HOPEWELL,
Notary Public in and for the City of St. Louis, State of Missouri.

My commission expires Oct. 3, 1917.

88 Document No. 22.

Notice of Removal.

Filed in State Court October 31, 1916.

In the District Court of the State of Iowa, in and for Wapello County.

Law. #9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Notice of Removal.

To E. H. Emery & Company, the above-named plaintiff, and Mr. C. W. Whitmore, its attorney of record:

You and each of you are hereby notified that on the 31st day of October A. D. 1916, before noon, the above named defendant will file in the above mentioned court its petition and bond for the removal of the above entitled cause from said court to the District Court of the United States for the Southern District of Iowa, Ottumwa division, at Ottumwa.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for Defendant.

Service of the above notice is hereby acknowledged this 30th day of October A. D. 1916.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

89 Document No. 23.

Bond for Removal.

Filed in State Court October 31, 1916.

"In the District Court of the State of Iowa, in and for Wapello County.

Law. No. 9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Bond for Removal.

Know all men by these presents: That we, American Refrigerator Transit Company, a corporation, duly organized under and by virtue of the laws of the State of New Jersey, as principal, and United States Fidelity and Guaranty Company as surety, are holden and stand firmly bound unto E. H. Emery & Company in the penal sum of One Thousand Dollars ($1,000.) for the payment whereof well and truly to be made unto the said E. H. Emery & Company, its successors, or assigns, we bind ourselves, our successors, or assigns jointly and firmly by these presents:

Upon condition, nevertheless, that whereas, the said American Refrigerator Transit Company, has filed its petition in the District Court of the State of Iowa in and for Wapello County, for the removal of a certain cause therein pending, wherein the said E. H. Emery & Company is plaintiff and the said American Refrigerator Transit Company is defendant, to the District Court of the United States, in and for the Southern District of Iowa.

Now, if the said American Refrigerator Transit Company shall within thirty days from the time of filing its said petition enter in the said District Court of the United States a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if said Court shall hold said suit was wrongfully and improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof, The American Refrigerator Transit Company

and United States Fidelity and Guaranty Company have hereunto set our hands and seals this 30th day of October A. D. 1916.

AMERICAN REFRIGERATOR TRANSIT COMPANY,

By BRAMMER, LEHMANN & SEEVERS AND
90 McNETT & McNETT,
Its Attorneys.

[SEAL.] UNITED STATES FIDELITY & GUARANTY CO.,
By R. E. WELLMAN,
Attorney in Fact.

Approved this 31st day of October 1916.

W. T. WILSON,
Clerk District Court,
By SAMUEL HAWKS,
Deputy.

91 Document No. 24.

Order of State Court Granting Removal.

November 28, 1916. District Court Record 44, Page 132.

In the District Court of Wapello County, Iowa.

Law. #9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Order.

Be it remembered that on the 28th day of November, A. D. 1916, the same being the 26th regular day of the October, 1916, term of the above named court, this matter came regularly on for hearing upon defendant's petition for removal of this cause to the United States District Court.

The court finds that the defendant herein has, within the time provided by law, filed its petition for removal of this cause to the District Court of the United States for the Southern District of Iowa, Ottumwa division; that due and timely notice of said petition has been served on plaintiff and its attorneys prior to said filing; that defendant at the time of filing of said petition of removal, offered its bond in the sum of one thousand dollars ($1,000) with good and sufficient surety, conditioned according to law; that said bond is legal and ample, and that the allegations of said petition are true.

Now therefore, it is ordered and adjudged that the court does hereby accept and approve said bond and grant said petition, and does order that this cause be removed for trial to the District Court of the United States for the Southern District of Iowa, Ottumwa division, pursuant to the statute of the United States; that the clerk is directed to at once cause the proper papers to be certified to the United States District Court aforesaid at Ottumwa, Iowa; and that all other proceedings of this court be stayed. To which ruling and order plaintiff at the time duly excepts.

D. M. ANDERSON,
Judge.

92 Document No. 25.

Certificate of Clerk of State Court to Transcript.

STATE OF IOWA,
Wapello County, ss:

I, W. T. Wilson, clerk of the District Court of the State of Iowa in and for said County, do hereby certify that the above and foregoing is a true, perfect and complete transcript of the Auxiliary Petition in Attachment filed August 31st, 1916, Order on said Petition, Original Notice and Sheriff's return of service thereon filed September 15, 1916; Attachment Writ, and Sheriff's service thereon; Notice to Garnishee and Sheriff's service thereon; Notice of Levy of Attachment and Sheriff's service thereon; Sheriff's levy; Court's Memorandum Filed October 14, 1916; Judgment entry of date 18th of August, 1916, term; Substituted Petition filed October 16, 1916; Opinion of the Court filed August 9th, 1916; Answer of American Refrigerator Transit Company filed December 1st, 1914; Petition for Removal; Notice of Petition for Removal; Bond for Removal; and order of Removal in the case of E. H. Emery & Company vs. American Refrigerator Transit Company No. 9643 Law, as full and complete as the same remain of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my office, in Ottumwa, in said County, this 28th day of November, A. D. 1916.

W. T. WILSON,
Clerk District Court, Wapello County, Iowa.

93 Filings and Proceedings in the United States District Court in and for the Southern District of Iowa, Ottumwa Division.

Transcript.

The Foregoing Transcript from the State Court Filed November 29, 1916, in said United States Court.

94 Document No. 26.

Plaintiff's Motion to Remand Filed December 1st, 1916.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

U. S. No. 30. Law.

State No. 9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Plaintiff's Motion to Remand.

Comes now the plaintiff and respectfully moves the Court for an order remanding this cause to the District Court of the State of Iowa in and for Wapello County, on the grounds:

1. That the defendant has waived any right it may have had for removal; and has not filed its petition for removal within the time required by law, the record showing plaintiff's original petition was filed February 13, 1914; its substituted petition filed September 9th, 1914, to which said defendant filed answer on the merits December 1st, 1914, resulting in trial on such issues of fact embodied in judgment dated September 16th, 1916, dismissing, over plaintiff's objections, the co-defendant the Chicago, Burlington & Quincy Railroad Company, and retaining jurisdiction in rem as to the defendant herein, requiring plaintiff to file amended complaint as to it alone; and defendant's petition for removal was not filed until October 31st, 1916.

2. That this court is without jurisdiction to hear and determine said cause in that:

(*a*) It is a suit of a civil nature, between citizens of different states, where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of three thousand dollars.

(*b*) It is not a suit or proceeding arising under any law regulating commerce.

(*c*) Plaintiff's petition below shows it to be a suit brought in a State court of competent jurisdiction against defendant as a corporation engaged in and carrying on the business of a common carrier,

to wit: the undertaking of the Missouri, Kansas and Texas Railway Company of Texas under the latter's bill of lading covering
95 each car in question and under defendant's contract with said company of date March 12, 1912, and the removal of which class of suits is prohibited by act of Congress approved January 20, 1914.

(*d*) Defendant is not subject to the Interstate commerce act, and plaintiff's petition expressly avers it was not a party to the bill of lading, tariff, classification or schedule governing the shipments involved, and there is therefore no federal law involved herein.

(*e*) Defendant has evaded federal control by not subjecting itself to the Interstate act to regulate commerce, and may not therefore now invoke federal jurisdiction.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

Copy of the within Motion to Remand received this 1st day of December, 1916.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for American Refrigerator Transit Company.

96 Document No. 27.

Defendant's Resistance to Motion to Remand Filed December 5, 1916.

In the District Court of the United States for the Southern District of Iowa, Ottumwa Division.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Resistance to Motion to Remand.

Comes now the defendant and resists the motion to remand filed by the plaintiff in the above entitled cause, and objects to the granting of said motion, because said motion is not well taken.

But as shown by the record in this cause, the defendant is entitled to have said cause removed to the United States Court and tried therein.

Wherefore defendant respectfully asks that it be given time to make such showing as may be necessary in support of said removal and that it be given an opportunity to be heard in support thereof.

BRAMMER, LEHMANN & SEEVERS,
McNETT & McNETT,
Attorneys for Defendant.

Copy received December 5th, 1916.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

97 Document No. 28.

Memorandum Opinion of Court Overruling Motion to Remand.

Filed March 7, 1917.

In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Nos. 27, 28, 29 and 30.

Memorandum Opinion Upon Motion to Remand.

First. Was the Petition for Removal Filed too late?

Numbers 27, 28, 29 are certainly absolutely new cases, which are in no manner connected with any prior suits. The prior suits involved the same cause of action against this defendant were finally dismissed after judgment in favor of its co-defendant, because not brought in the proper county. This left no suits pending upon these causes of action, and these new suits are entirely independent thereof. So that there can be no question that the petitions were filed in time.

As to Number 30, the same proceedings were had, except that in filing the petition in this case, it was called an "Auxiliary Petition," but the original suit as to both parties therein was dismissed. That left no cause of action upon the original petition. The only cause of action before the State Court and this court in this case arises upon the "Auxiliary Petition." "If it (the issuance of the attachment) be subsequent to the commencement of the action, a separate petition must be filed, and in all cases, the proceedings relative to the attachment, are to be deemed independent of the ordinary proceedings and only auxiliary thereto." Judge Vermilion well said:

"If, as there provided, the attachment when sued out subsequent to the commencement of the action is to be deemed independent of, and only auxiliary to the main case, I am unable to see how it can confer jurisdiction to render a judgment upon a trial previously held, and where independent of the attachment, the judgment could not be rendered because of the failure of the personal jurisdiction. The jurisdiction in rem., acquired under the attachment, cannot I think, operate to give effect to the trial and before it was acquired, and which, independent of the attachment, must

fail of effect because of the defendant's being required to appear in the wrong county."

And thereupon Judge Vermilion dismissed the original suit against the American Refrigerator Transit Company. That
98 case was then ended. This action stood as a new action. The first was a personal action; this is an action in rem. Upon the record, there is nothing left of the previous action.

Counsel refers to stipulation with relation to the trial of the causes, waiving a jury, etc., but this stipulation was filed in the old cause long before any of these cases were commenced, and can have no bearing upon the right of removal of these new cases. In fact, I see nothing in the stipulation bearing upon the trial of these cases where commenced, and can have no bearing upon the right of removal of these new cases. In fact, I see nothing in the stipulation bearing upon the trial of these new cases. If the stipulation related to the old cases, its force terminated when the old cases were disposed of.

So the petitions for removal were filed in time.

Second. Has this Court jurisdiction of the cases?

This question depends upon whether the causes of action or any of them, set forth in these petitions, arise under the laws of the United States. Upon this question there can be no doubt. If a right asserted in court is not a common law right, or does not arise under a state statute, but is created and allowed only under a statute of the United States, there can be no question but that it is a suit arising under the laws of the United States, and that the United States Courts have jurisdiction. Swafford vs. Templeton, 185 U. S., 487; 22 Sup. Ct., 783; 46 Law, -ed. 1005; McGoon vs. Nor. Pac. Co., 204 Fed., 998; Alabama Ry. vs. American Cotton Oil Co., 229 Fed. 11.

In some cases it is difficult to determine whether the case does arise under the laws of the United States, but in these cases, there can be absolutely no doubt under numerous averments of the petition. For instance:

"Defendant expressly assumed the liability of the "Katy" system. That said system as the initial carrier under the interstate commerce act, was liable for such damages, whether occurring on its own line, or that of a connecting or delivering carrier, or through the fault of defendant; and by virtue of such assumption of liability by defendant, plaintiff has the same right of action against it as it would have against said M. K. & T. Railway Company of Texas."

In addition to this, it is charged in one place that the defendant was a partner of the Railway Company, and in another place it is averred that the defendant assumed all of the obligations of the railway company under its bill of lading.

99 Now this being an interstate shipment, and the plaintiff insisting that defendant is liable, not only for the damage occurring upon the M. K. & T. Railway, with which the defendant was under contractual relations, but also that it is liable for damages upon the lines of connecting carriers. Where does it find the

law establishing such liability? Clearly not in the common law, and certainly not in any state legislation.

The plaintiff must rely upon the Carmack amendment which alone creates a liability upon the initial carrier for the negligence of all connecting carriers. Therefore, the plaintiff specifically pleads a cause of action arising under an Act of Congress, and of every such cause of action, this court has jurisdiction.

The bill of lading upon which the plaintiff relies, is one for interstate shipment—the construction of which, and the legality of which, are governed by Acts of Congress, and not by the common law, or state law.

So that there can be no question but that, aside from the question of amount in controversy, this case is within the jurisdiction of this court as an original action, or upon removal.

Third. Effect of the Cummins Amendment.

As to the effect of the Cummins amendment, I am in grave doubt; but being in doubt, and there being no right of appeal from an order remanding the case, it is my duty to over-rule the motion to remand, because from such order, an appeal will lie. Boatmans Bank vs. Fritzlen, 135 Fed. 650; Fritzlen vs. Boatmans Bank, 198 U. S. 585; Fritzlen vs. Boatsmans Bank, 212 U. S. 364. Martin vs. Water Company, 197 Fed. 462. Drainage District vs. Railway, 198 Fed. 253. Strother vs. Railway, 220 Fed. 731, on motion to remand at outset.

If there was an action against a carrier, clearly there could be no removal; but plaintiff insists that it is not an action against a carrier, and the defendant likewise makes the same contention. The language of the Amendment seems to be very specific. It provides that "no suit brought in any state court of competent jurisdiction against a railroad company, or other corporation or person engaged in, and carrying on the business of a carrier, to recover damages for delay, loss of, or injury to, property received for transportation by such common carrier, under section Twenty of the Act to regulate commerce, shall be removed" except where the matter in controversy is of the value of $3,000.

Counsel well says, that this should be given a liberal construction: but even a liberal construction can hardly bring the case within the language used, which is very specific. The limitation "engaged in, and carrying on the business of a common carrier," is specific. The language "received for transportation by such common carrier, under Section twenty of the Act," is more specific. The defendant did not receive this property in any sense, and not being a carrier, it could not be held to have received it "under Section twenty of the act to regulate commerce."

An action of this kind was clearly not in contemplation of Congress, and this is explainable in view of the apparent fact that this is the first case of this kind that has been before the courts; at least counsel refer to no such case, and I have found none. It is clear that if Congress had any knowledge of such proceeding, that it would have included it in the limitation, because the reasons for the legis-

lation would be just as forceful as were the reasons which inspired the Amendment.

In view of the expressed attitude of congress upon the question, these cases ought not to be removable; but under the plain language of the statute, they are removable unless they are excluded by the amendment. I would remand them if I could, but as above stated, where doubt exists, the court is compelled, under the decisions of the Supreme Court of the United States as well as of this Circuit, to overrule the motions to remand, for the reason that from such an order, an appeal will lie, and from an order remanding, an appeal will not lie, and I am always anxious that parties shall have a right to have a review of any rulings made.

Of course if the plaintiff brought this action upon the theory announced by Judge Vermilion, which would be an action in tort, no removal could be had. The removal is sustained only because the plaintiff has chosen to rely, not on the tort, but upon rights claimed to arise under the bill of lading, and that laws of the United States.

It may be possible on trial that the court will be required to hold, as did Judge Vermilion, that there is no cause of action except for tort, and in that event, whether the court would lose jurisdiction, is a question which is not determined herein.

Therefore, the clerk will enter in each of the above cases the following Order:

101 And now on towit, on this 7th day of March, 1917, in the above entitled cause, the Motion to Remand having been heretofore submitted, and the court being now fully advised, finds, that the said motion to amend should be, and the same is, hereby overruled. Plaintiff excepts.

MARTIN J. WADE,
Judge.

Which Order was duly entered of record.

102 Document No. 29.

Plaintiff's Assignment of Error, and Plaintiff's Motion for Reconsideration of Order Overruling Its Motion to Remand, etc.

Filed March 13, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law Nos. 27, 28, 29, 30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Plaintiff's Application for Order, and for Reconsideration of Order Overruling Motion to Remand, and Assignment of Errors.

Comes now the plaintiff in each of the above entitled causes and respectfully moves the Court for an order in each of the causes, embodying as part of the record therein, the various documents filed by plaintiff as part of the record, and submitted to the Court with plaintiff's briefs, and all of which were considered by the Court as part of the record, and all of which without objection by opposing counsel were by the Court considered as part of the record in overruling plaintiff's motion in each case to remand. Among the said documents being original bill of lading, stipulation of counsel waiving jury, etc.; two opinions and orders by Judge Vermilion, and contract of the A. R. T. Company with the M. K. & T. Railway Company of Texas, and any other documents so filed.

And plaintiff respectfully moves the court for reconsideration of its order overruling plaintiff's motion to remand each of said causes to the state court, on the grounds, now assigned for error:

1. That the court is in error in overruling said motion.

2. The court is in error in holding a present right of appeal from such order exists, and basing his order in part on such position.

3. The court is in error in not considering the proposition defendant is not a common carrier, is not subject to the act to regulate interstate commerce, and therefore there is no federal question involved.

4. The court is in error in holding that the gravamen of the action is ex contractu, it being in tort.

CHESTER W. WHITMORE,
Attorney for Plaintiff.

103 STATE OF IOWA,
Polk County, ss:

I, Chester W. Whitmore, being first duly sworn, on oath state that the various documents referred to in the foregoing motion were part of the record in the state court below at the time same were removed and were filed by plaintiff with its briefs submitted to the Court in support of plaintiff's motion to remand.

CHESTER W. WHITMORE.

Subscribed in my presence and sworn to by the said Chester W. Whitmore this 9th day of March, 1917.

[Supreme Court Seal.]

J. W. ARNEY,
Deputy Clerk Supreme Court of Iowa,
Des Moines, Iowa.

104 Document No. 30.

Order of Federal Court Sustaining Plaintiff's Motion to Complete Record.

Entered March 30, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Federal Court, Law No. 30.

State Court, Law No. 9643.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Order.

This cause coming on for hearing this 20th day of March, 1917, upon plaintiff's application to correct omissions in the transcript — record, both parties being present by counsel in open court, and heard, the court now makes part of the record considered by it in overruling plaintiff's motion to remand the opinion of Judge Vermilion filed in the state court August 9th, 1916, identified as Exhibit "A" hereof; and his order of date September 16, 1916, made part hereof as Exhibit "B."

MARTIN J. WADE,
Judge.

105 Document No. 31.

Order Overruling Plaintiff's Motion to Reconsider.

Entered March 30, 1917.

In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law Nos. 27, 28, 29, 30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Order.

On this 20th day of March, 1917, this cause comes on for hearing, on motion of the plaintiff to reconsider ruling upon motion to remand, the plaintiff appearing by Chester W. Whitmore, its attorney, and the defendant by McNett & McNett, its attorneys, and the Court having heard the arguments of counsel, overrules said motion, and plaintiff excepts.

Thereupon, upon motion of the defendant, to separate petition into counts, the court having heard the arguments of counsel, sustains said motion and plaintiff excepts.

MARTIN J. WADE,
Judge.

106 In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law. No. 30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto, that the notice set out as Document No. 12 at page 47 of the foregoing record, was entitled "Original Notice," and that the original record will so show, and that the heading thereof as "Notice of Attachment Under Auxiliary Petition" in the foregoing record and Bill of Exceptions was due to mistake and oversight.

It is also stipulated that defendant herein, on or about the 10th

day of March, 1917, filed in this cause, a motion to separate into counts, a copy of which is hereto attached marked Document No. 32. Said motion to separate into counts is the one referred to in the order of Court shown as Document No. 31, at page 102, of the foregoing.

It is stipulated that these matters should appear in the record on appeal at the request of the defendant herein.

(Sgd.) CHESTER W. WHITMORE,
Attorney for Plaintiff.
McNETT & McNETT,
BRAMMER, LEHMANN & SEEVERS,
Attorneys for Defendant.

(Endorsed:) Filed October 8, 1917. Wm. C. McArthur, Clerk, By Louis J. Adelman, Deputy.

107 Document No. 32.

In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

Law. No. 30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Motion to Separate Into Counts.

Comes now the defendant herein and moves the court to order plaintiff to file a new petition divided into counts each of which will be complete by itself.

In support of this motion defendant shows the court that the present petition consists of five "theories," the first of which purports to be divided into eleven counts. Theories two to five inclusive contain the statement that plaintiff reavers each of the allegations made in the first counts and then add other allegations. The necessary result of such allegations is that theories two to five each state the cause of action set forth in theory one and in addition state or claim to state a cause of action additional to or different from that alleged in theory one and therefore each of these so called theories state two or more different causes of action.

Theory one states that it is ex contractu, theories four and five state that they are ex delicto. Hence it follows that these two theories contain allegations which plaintiff claims establishes two causes of action, one incontract one in tort.

McNETT & McNETT,
BRAMMER, LEHMANN & SEEVERS,
Attorneys for Defendant.

108 Service of the foregoing motion and receipt of copy thereof acknowledged this — day of ——, 1917.

C. W. WHITMORE,
Attorney for Plaintiff.

109 In the District Court of the United States in and for the Southern District of Iowa, Ottumwa Division.

Law. #30.

E. H. EMERY & COMPANY, Plaintiff,

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, Defendant.

Stipulation.

It is stipulated that the Judgment, appeal, citation and Bill of Exceptions in said cause, constitutes the full record which shall be certified by the clerk of this court and incorporated in the transcript of record upon such appeal.

Dated Ottumwa, Iowa, September 17th, 1917.

CHESTER W. WHITMORE,
Of Ottumwa, Iowa,
Attorney for Plaintiff.
McNETT & McNETT,
Of Ottumwa, Iowa;
BRAMMER, LEHMANN & SEEVERS,
Of Des Moines, Iowa;

Attorneys for Defendant.

(Endorsed:) Filed Sept. 19, 1917. Wm. C. McArthur, Clerk, By Louis J. Adelman, Deputy.

110 UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa hereby certify the foregoing 109 pages to contain a full, true and complete transcript of the record of the case of E. H. Emery & Co., Appellant vs. American Refrigerator Transit Company, Appellee, No. 30—Law, Ottumwa Division, as called for by the Stipulation of the parties filed in said cause on September 19, 1917; as fully as the same appears among the records in this office.

I further certify that I transmit herewith as part of said transcript the original Citation with acceptance of service thereof by Appellee.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Ottumwa in said District this 11th day of October A. D. 1917.

[Seal District Court of the United States, Southern District of Iowa, Davenport Division.]

WM. C. McARTHUR,
Clerk U. S. District Court, Southern District of Iowa.

Endorsed on cover: File No. 26,206. S. Iowa D. C. U. S. Term No. 739. E. H. Emery & Company, appellant, vs. American Refrigerator Transit Company. Filed October 13th, 1917. File No. 26,206.

12

Office Supreme Court, U. S.
FILED
JAN 4 1918
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

E. H. EMERY & COMPANY,
Plaintiff and Appellant,

VS.

AMERICAN REFRIGERATOR TRANSIT COMPANY,
Defendant and Appellee.

Law.
Term No. 739.
General No. 26206.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, OTTUMWA DIVISION.
HON. MARTIN J. WADE, DISTRICT JUDGE.

APPELLANT'S MOTION TO ADVANCE THE CASE, AND BRIEF IN SUPPORT OF THE APPEAL.

CHESTER W. WHITMORE, ESQ.,
of Ottumwa, Iowa,
Attorney for Appellant.
MESSRS. BRAMMER, LEHMANN & SEEVERS,
of Des Moines, Iowa,
MESSRS. MCNETT & MCNETT,
of Ottumwa, Iowa,
Attorneys for Appellee.

Due, timely and legal service of the within Motion and Brief accepted and copy of same received for and on behalf of appellee this ..... day of December, 1917.

.....,

.....,
Attorneys for Appellee, American Refrigerator Transit Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

E. H. EMERY & COMPANY,
Plaintiff and Appellant,

VS.

AMERICAN REFRIGERATOR TRANSIT COMPANY,
Defendant and Appellee.

Law.
Term No. 739.
General No. 26206.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, OTTUMWA DIVISION.
HON. MARTIN J. WADE, DISTRICT JUDGE.

APPELLANT'S MOTION TO ADVANCE THE CASE, AND BRIEF IN SUPPORT OF THE APPEAL.

MOTION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Plaintiff and appellant, E. H. Emery & Company respectfully moves the court, under rule 32, for an order advancing the case and setting the same for submission, at a time to be designated by the court in its order.

CHESTER W. WHITMORE,
Attorney for Appellant.

STATEMENT OF THE FACTS AND OBJECTS OF THE MOTION.

The only question in issue is that of jurisdiction of the United States District Court. Rule 32.

Plaintiff and appellant, E. H. Emery & Company, is a partnership. The firm is composed of E. H. Emery and W. W. Copeland. Its principal place of business is located at Ottumwa, Iowa. Both partners are citizens of the State of Iowa, Mr. Emery residing at Ottumwa, and Mr. Copeland at Burlington (Transcript 10). The firm is engaged in the wholesale fruit business.

The defendant, American Refrigerator Transit Company is a corporation organized and existing under the laws of the State of New Jersey (Transcript 19). For brevity it will hereafter be designated as the "refrigerator company."

The matter in controversy is the principal sum of $618.25 (Transcript 58-59). This amount appellant claims as damages sustained to eight car loads of fresh peaches shipped by plaintiff from various Texas points in 1912, to plaintiff at various Iowa points, under the uniform or standard straight form of bill of lading issued by the initial carriers to plaintiff, but to which bill of lading the refrigerator company was not a party (Transcript 52, par. 7). And it was not a party to the governing tariffs (Transcript 53, par. 9).

Plaintiff did not join the initial carriers, the Missouri, Kansas and Texas Railway Company of Texas, and the International and Great Northern Railroad Company, as service of original notice could not be had upon them in the State of Iowa, and they were in the hands of receivers, and because for years it had been the custom for plaintiff to file said claims with the refrigerator company, and not with the carriers, and plaintiff was instructed by Mr. L. Weiler, freight claim agent of the refrigerator company to send the claims on the cars involved direct to him (Transcript 60-61).

Suit was instituted by plaintiff against the delivering carrier, the Chicago, Burlington and Quincy Railroad Company, in the District Court of the State of Iowa, in and for Wapello County, as State Court No. 9643. Ottumwa is situated in that county. The original petition filed in the State Court, 1914, February 13, appears as document No. 7, printed page 10 of Transcript of Record herein. The C. B. & Q. Rd. Co. runs in and through Wapello County; hence no question as to venue arose as to it.

A chronological history of the case, marking the various proceedings, filings, orders, etc., is indicated at page 2 of the Transcript.

In that action in the State Court, the refrigerator company was joined, and appeared, as a defendant. Service of notice of suit upon it being had in Linn County, Iowa, at Cedar Rapids.

It was joined as defendant under allegation that it was a joint tort feasor. That its acts, co-operating with those of the carriers, in the common transaction of transporting the peaches, had caused the damages complained of. That it was the owner and operator of the refrigerator cars in which the peaches were hauled, and that it loaded the peaches in those cars. That it furnished these cars under contract, between it and the initial carriers quoted at pp. 51-52, Transcript; and also under agreement specifically had between it and plaintiff through the correspondence set up at pp. 53-54, Transcript.

This petition charged that, as so operated, the refrigerator company was a common carrier (Transcript, p. 10, par. 4).

Since then Your Honors, 1915, May 10, have had occasion to consider the case of *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 59 Law ed. 1036, where you held the Armour Car Lines not subject to regulation by the Interstate Commerce Commission. The judge trying the cause at bar in the State Court, the Hon. C. W. Vermilion, held, 1916, August 9 (Transcript p. 35), after a year's consideration on submission, in a formal finding of

facts, that under this decision the refrigerator company was not a common carrier. We invite a reading of this opinion of the state trial judge (pp. 25 to 38, Transcript) as giving a resume of the case.

Prior to trial counsel in this and five other cases stipulated (Transcript 21) they should be tried upon the same evidence and record so far as applicable, both in the trial and appellate courts (Transcript 22, par. 2), a jury being waived.

The trial before the State Court was had 1915, October 4 to 16 (Transcript p. 23). And resulted in the formal final judgment of that court, 1916, October 16 (Transcript 49), exonerating the C. B. & Q. Rd. Co. on the ground, as previously set forth in the opinion, that the plaintiff had not complied with that provision of the B/L requiring claim in writing to be presented to the agent of the carrier at point of origin or delivery within four months after delivery. The trial judge holding it was not sufficient thereunder that the agent of the carrier at point of delivery personally examined the shipment before unloaded and then and there saw its condition, as to which there was no dispute (Transcript p. 30, par. 1), and made notation on the freight or expense bill given by it to plaintiff in evidence of payment of charges, showing the nature, extent and cause of the damage (Transcript pp. 14, 15, 16, 17), and notwithstanding it had been the custom for years for plaintiff to handle such claims direct with Mr. Weiler, freight claim agent of the refrigerator company, without regard to any limitation of time for presentation of same to him, and same had been presented to him.

But Judge Vermilion refused to exonerate the co-defendant, refrigerator company, and held (Transcript 36-37), that but for what he held to be defect in venue as to it, plaintiff should recover from it the damages sought. And in the formal judgment entry releasing the C. B. & Q. Rd. Co., jurisdiction was still retained over the refrigerator company under attachment proceedings (Transcript 50, last paragraph).

Judge Vermilion having filed his opinion and findings, 1916, August 9, the defendant, refrigerator company, 1916, September 7, moved dismissal as to it on the grounds recited (Transcript 44), that is, not on the merits, but solely on the question of venue.

On which motion Judge Vermilion, 1916, September 16, discussed the facts and the Iowa statutes involved, in his further opinion and order (Transcript 45 to 48), holding the refrigerator company was not the owner or operator of a line of cars operated in Wapello County. Hence could not be sued in that county in a personal action on notice served in another county, under the provisions of section 3497 of the Iowa Code quoted by him. That as service of notice of suit upon such defendant was had in Linn County, the suit should have been instituted there. And that the suit having been dismissed on the merits as to the joint defendant, the C. B. & Q. Rd. Co. must, under the peculiar statute, section 3502 of the Iowa Code quoted by him, be dismissed as to the refrigerator company, on the question of venue only.

Guarding against such an outcome plaintiff had meanwhile, 1916, August 31, filed in the same action 9643 in the District Court of Wapello County, its auxiliary petition in attachment (Transcript 24), against the refrigerator company, under order of court authorizing same.

And under the writ of attachment so issued garnisheed the Chicago, Burlington and Quincy Railroad Company as a supposed debtor of the refrigerator company (Transcript, 41).

The said garnishee failed to appear or answer at the time set and formal order of default for want of such appearance or answer was by the state court entered of record against it and still stands, awaiting in the state court outcome of the final determination of the attachment suit as between plaintiff and the refrigerator company.

The authority for such attachment was Section 3876 of the *Iowa Code*, reading:

"The plaintiff in a civil action may cause the property of the defendant, not exempt from execution, to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed."

Section 3877: "If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceeding and only auxiliary thereto" (This section was construed by Judge Vermilion in his interlocutory order, 1916, October 14, Transcript 48).

Section 3878 authorizing attachment where defendant is a foreign corporation, or a non-resident of the state.

Section 3495: "An action against a non-resident of the state when aided by an attachment, may be brought in any county of the state wherein any part of the property sought to be attached may be found" etc.

To obtain such attachment Code Section 3877 required a separate petition. This was filed 1916 August 31 (Transcript 24) in the original case, 9643, and as against both defendants. In the final judgment (Transcript 50, last paragraph) the court still retained jurisdiction *in rem* against the refrigerator company under these proceedings in attachment and garnishment but ordered a new petition to be filed.

This new substituted petition was filed 1916, October 16, in the State Court under the same number (9643) as the original action (Transcript, 51 to 65). It sought recovery upon the same shipments involved in the original petition, and no others. It prayed for the same damages as in the first petition. It brought in no new defendant. It was against the same refrigerator company. It set up the relation of the refrigerator company with the initial carriers and with plaintiff through its contracts, correspondence, dealings and acts. It recited that the shipments moved under the usual form of straight uniform B/L (Transcript, 54, par. 18, and p. 52, par. 1) issued by the initial carrier, which carrier was a party to the governing tariffs identified (Transcript, 53, par. 10). That the refrigerator company was not a party to such tariffs

(Transcript, 53 par. 9). That under its contract with the initial carrier it furnished the refrigerator cars, the ice, and the labor for icing, loading, stowing and bracing of the baskets of peaches (Transcript, 54, par. 19). The petition declared upon six counts or theories:

First. Negligence upon the part of the refrigerator company in furnishing for such shipments refrigerator cars equipped with ice bunkers of unusually small and inadequate capacity, and by failing to re-ice the bunkers en route, and in failing to brace the baskets of peaches in the cars with 2x4's so as to prevent their shifting in transit (Transcript, 55-56).

Second. That by its contract with the initial carrier the refrigerator company assumed the liability of the carriers (Transcript, 59).

Third. That under their working agreements, sharing of revenue and losses, the refrigerator company and the initial carrier were liable as partners.

Fourth. Estoppel, in that by the correspondence of Mr. L. Weiler, freight claim agent of the refrigerator company, with plaintiff, quoted in the petition, the said defendant instructed plaintiff to send the claims on these shipments to it and that it would handle same.

Fifth. That the refrigerator company in furnishing the cars, the ice, the icing services, stowing and bracing the peaches, was the agent of the initial carrier and liable to plaintiff for misfeasance of those duties (A doctrine discussed by Judge Vermilion, Transcript, 36-37).

Sixth. Tort, in that the refrigerator company, under its contract with the initial carrier, agreed to perform the latter's public duties of furnishing the refrigerator cars, icing, icing services, stowing and bracing, and failed to exercise reasonable care in such respects.

The refrigerator company thereupon, 1916, October 31, filed its petition for removal of said case to the United States District Court, on the ground that:

> "Said suit is a suit and proceeding of civil nature arising under a federal law regulating interstate commerce and is not a suit or proceeding exclusive jurisdiction of which has been conferred upon the Commerce Court, and this petitioner, the American Refrigerator Transit Company, defendant in said suit, is not a railroad company or other corporation or person engaged in or carrying on the business of a common carrier" (Transcript, 66).

Which petition was accompanied by proper bond and notice of removal.

Whereupon the state court, over plaintiff's exception, 1916, November 16, granted the removal (Transcript, 69).

And transcript from the state court of the proceedings hereinbefore indicated was filed in the United States District Court, 1916, November 29 (Transcript, 71).

Whereupon plaintiff filed, 1916, December 1, in the United States District Court, its motion to remand said cause to the state court, on the grounds (Transcript, 71):

> "1. That the defendant has waived any right it may have had for removal; and has not filed its petition for removal within the time required by law, the record showing plaintiff's original petition was filed February 13, 1914; its substituted petition filed September 9th, 1914, to which said defendant filed answer on the merits December 1st, 1914, resulting in trial on such issues of fact embodied in judgment dated September 16th, 1916, dismissing, over plaintiff's objections, the co-defendant, the Chicago, Burlington & Quincy Railroad Company, and retaining jurisdiction *in rem* as to the defendant herein, requiring plaintiff to file amended complaint as to it alone; and defendant's petition for removal was not filed until October 31st, 1916.
>
> 2. That this court is without jurisdiction to hear and determine said cause, in that:
>
> (a) It is a suit of a civil nature, between citizens of different states, where the matter in controversy does not exceed,

exclusive of interest and costs, the sum or value of three thousand dollars.

(b) It is not a suit or proceeding arising under any law regulating commerce.

(c) Plaintiff's petition below shows it to be a suit brought in a state court of competent jurisdiction against defendant as a corporation engaged in and carrying on the business of a common carrier, to-wit, the undertaking of the Missouri, Kansas and Texas Railway Company of Texas under the latter's bill of lading covering each car in question and under defendant's contract with said company of date March 12, 1912, and the removal of which class of suits is prohibited by Act of Congress approved January 20, 1914.

(d) Defendant is not subject to the Interstate Commerce Act, and plaintiff's petition expressly avers it was not a party to the bill of lading, tariff, classification or schedule governing the shipments involved, and there is therefore no federal law involved herein.

(e) Defendant has evaded federal control by not subjecting itself to the Interstate Act to regulate commerce, and may not therefore now invoke federal jurisdiction."

Which motion to remand was resisted by said defendant (Transcript, 72).

Said motion and resistance having been argued and submitted to the United States District Court the District Judge 1917, March 7th, filed a memorandum opinion (Transcript, 73 to 76) overruling the motion to remand, over plaintiff's exception.

Plaintiff 1917, March 13, moved reconsideration of the order, and assigned as error the action of the court in overruling the motion and in retaining jurisdiction (Transcript, 77).

The District Judge 1917, March 30, overruled plaintiff's motion to reconsider (Transcript, 79).

Whereupon plaintiff elected to stand upon its motion to remand, and denied jurisdiction of the United States Court, and refused to proceed further (Transcript, 4 and 5).

This position plaintiff took upon authority of:

Judicial Code, approved March 3, 1911, Section 238.
Boatmen's Bank of St. Louis v. *Fritzler*, 135 Federal 650.
Weeker v. *National Enameling & Stamping Co.*, 204 U. S. 176; 54 Law Ed. 430.
Patch admr. v. *Wabash Rd. Co.*, 207 U. S. 277, 52 Law Ed. 201.
McAllister admr. v. *Chesapeake & Ohio Ry. Co.*, 243 U. S. 302, 61 Law Ed. 735.

The United States District Court consequently dismissed the suit, denied plaintiff's petition, and ordered that plaintiff take nothing, and go hence without day, and entered judgment against plaintiff for costs of the action, and granted an appeal by plaintiff direct to the Supreme Court of the United States solely on the question of "whether or not upon the record upon plaintiff's motion to remand said cause this court has jurisdiction of said action, or should said motion to remand be sustained" (Transcript, 6).

The appeal was allowed in open court, counsel for defendant being present, the order for appeal to operate as citation (Transcript, 7), in addition to which defendant was cited in (Transcript, 7).

SPECIFICATION OF ERRORS RELIED UPON.

The District Court erred in overruling plaintiff's motion to remand.

The motion to remand is at p. 71, transcript.

The order overruling it is at pp. 73 to 76.

Plaintiff's motion to reconsider such order, and assigning error overruling the motion, is at p. 77.

The order overruling the motion to reconsider is at p. 79.

Plaintiff's election to stand on the record is at p. 4.

The judgment, certificate and appeal is at p. 6.

BRIEF OF APPELLANT'S ARGUMENT.

Point 1. Construction of the interstate commerce act as between plaintiff and defendant is not involved, as defendant is not subject to that act and was not a party to the bill of lading or a joint or participating party to the tariffs and classifications governing the shipments.

Point 2. The removal is prohibited by the Cummins amendment to the judicial code, approved January 20, 1914.

Point 3. The action having originally been instituted against the Chicago, Burlington and Quincy Railroad Company and the American Refrigerator Transit Company, charging joint tort, and the former having, by the Cummins amendment, been prohibited from removing the cause, and being dismissed in *in invitum* as to plaintiff upon trial on the merits in the state court, which retained jurisdiction *in rem* in the attachment proceedings as to the refrigerator company, it could not thereupon remove the action.

POINT 1.

The Refrigerator Company not being subject to the act to regulate commerce, and not being a party to the bill of lading or governing tariffs, classifications and schedules, cannot claim the benefit thereof. Hence the action is not one arising under a federal law regulating interstate commerce, as averred in the petition for removal (Transcript 66).

The right to remove is to be governed, not by what defendant avers, but upon the allegation of plaintiff's petition.

> *Chappell* v. *Wentworth*, 155 U. S. 102, 39 Law Ed. 85.
> "We repeat that the rule is settled that a case does not arise under the constitution or laws of the United States unless it appears from plaintiff's own statement, in the outset, that some title, right, privilege, or immunity on which recovery depends will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction."

Bankers' Mutual Casualty Co. v. *M. St. P. & S. S. M. Ry. Co.*, 192 U. S. 371, 48 Law Ed. 484, denying jurisdiction of an action to recover damages occasioned by the purloining by a roadmaster of a registered mail package consigned from Minneapolis, Minnesota to Harvey, North Dakota.

We submit there was more basis for federal jurisdiction in that case than at bar, in that plaintiff's peaches involved herein were not being shipped by mail.

The averment of plaintiff's petition is specific that the defendant Refrigerator Company "was not a party to any of the governing tariffs" (Transcript 53, Par. 9).

Hence there was no compliance by defendant with the act to regulate commerce by the filing of schedules containing the limitation of liability, requirement for claim in writing, etc., consequently there is no federal question under that act so invoked by it upon which it can rely.

> *Louisville & Nashville Rd. Co.* v. *Woodford*, 234 U. S. 46, 58 Law Ed. 1202.

If we correctly understand the recent decision of Your Honors in the case of *Reid* v. *Fargo*, 241 U. S. 544, 60 Law Ed. 1156, its holding is in effect that the defendant may not invoke the provisions of the B/L to which it was not a party, either directly, by participating in joint tariff, or otherwise; and is to the effect that a joint tort feasor not subject to the act to regulate commerce, and not having joined or participated in the bill of lading, tariff or classification under which the shipment was made, cannot claim the benefits of the provisions of the bill of lading.

The case involved the shipment of an automobile from London to New York. The American Express Co. received the shipment and was informed it was worth $3900. The International Mercantile Marine Company issued its bill of lading covering the car and limiting liability to $100. The stevedores unloading it were the defendants, Hogan & Son, by whose carelessness the car slipped into the sea. Read was the owner. He filed libel in admiralty against the Express Company, which cited the Mercantile Marine and Hogan in. The District Court imposed liability of $2,724.40, upon all defendants. The Circuit Court of Appeals, 130 C. C. A. 285, 213 Federal 771, let the Express Company and stevedores out and held the Mercantile Marine for only $100. On certiorari, opinion by the chief justice, it was held:

> "That as to the steamship company we are of the opinion that, on the failure to make the amount of the decree against Hogan & Son, the libelant will be entitled to recover over against that company to the amount of $100, to which its liability was limited, as stated in the bill of lading under which the shipment was made; second, that even looking upon the Express Company as a forwarder, under the circumstances of the case and the terms of the bill of lading under which the car was shipped by that company, the trial court rightly held it liable, and that recovery against it on failure to enforce the decree against Hogan & Sons will also obtain."

In other words, that the limitation of liability applied only to the benefit of the Mercantile Marine Company which issued it. That the American Express Company and Hogan & Son, not being

parties to the bill of lading, were liable for the full value of the car, as fixed by the District Court.

It may be urged that this case was decided in admiralty and not under the interstate commerce act. But we do not understand that sea law is any different than land law in construing bills of lading, and believe the judge sitting at the law bench gives them the same construction he would sitting in admiralty.

The Westminister, 127 Federal 680, C. C. A.
San Guglielmo, 241 Federal 969.

In other words, in application, that the Refrigerator Company in this case is no more entitled to the benefits of the bill of lading issued by the "Katy" system on the shipments in question, than Hogan & Son or the American Express Co., were entitled to the benefits of the bill of lading issued by the International Mercantile Marine Company in the *Reid* case.

The point is so clear illustration would seem unnecessary, but it can well be exemplified by the inquiry as to whether or not an insurance company sued in a State court on a policy indemnifying a shipper against loss or damage to an interstate commerce shipment, where the amount involved is less than $3000, could remove the action to the Federal Court on the ground that the B/L issued by the carrier limited the carrier's liability, or required shipper to give notice to the carrier in writing of any claim for damages and that plaintiff had failed to comply with such requirement, and that by reason thereof a federal question was involved?

The refrigerator company, not being subject to the act to regulate commerce, may not predicate federal jurisdiction upon construction of its contract with the carriers. This doctrine is exhaustively reviewed in the dissenting opinion in the case of *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, at p. 56 *et seq.*, 56 Law Ed. 667.

May we be pardoned another illustration. Where an interstate shipment is lost or damaged by fault of an employe of the railroad company, which reimburses the shipper, and then sues the

employe for recoupment, could the latter remove the cause to the Federal Court on the ground that a federal question was involved? We anticipate not; that it would be held the act to regulate commerce was not directly involved; that its collateral or incidental consideration could not confer jurisdiction; that its provisions could not be invoked by one not subject to its terms. That if the employe should insist that in such capacity he was engaged in and carrying on the business of the common carrier in handling for it the shipment involved, he would then bring himself within the inhibition against removal contained in the Cummins amendment quoted under *Point 2* hereinafter.

The fact that a connecting carrier, participating party to the joint tariff governing, may claim the benefits of the bill of lading, as held in *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 57 Law Ed. 683, is aside from the point. As by joining and participating in the tariff, classification, etc., as filed with the Commission, it thereby subjects itself to federal jurisdiction and control, specifically to the Carmack amendment requiring through B/L as construed in the *Carl* case. It is a common carrier engaged in interstate commerce and therefore subject to the commerce clause. As said in the *Carl* case:

> "Any stipulation in its own receipt was ineffective insofar as it was not authorized by the section of the act referred to, whether intended for its own benefit or that of the succeeding carrier."

But we understand this proposition does not apply to car line companies, such as the Armour Car Lines, the American Refrigerator Transit Company and kindred organizations. They are not common carriers and are not subject to the federal act regulating carriers.

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434, 59 Law Ed. 1036.

But to meet this situation counsel for defendant urge plaintiff in this action is seeking to hold the refrigerator company not only for its own fault in handling the shipments but also for the liability imposed by law upon the carriers, on the charge in the second count of the substituted petition (Transcript 59) that the refrigerator company assumed the liability of the initial carrier; and, under averments of the third count (Transcript 60) was liable as a partner with the initial carrier. And that this involves consideration of the federal law regulating interstate commerce. To which plaintiff responds with its second assignment of error, or point herein, viz: that the Cummins amendment to the judicial code has prohibited the carrier from removing such suits, and the refrigerator company, not being a common carrier, itself not subject to the interstate commerce act, cannot have a greater right than its principal, the carrier.

POINT 2.

The removal was prohibited by the Cummins amendment to the judicial code, approved January 20, 1914, reading:

> "That the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary, approved March third, nineteen hundred and eleven, being chapter two hundred and thirty-one of Thirty-sixth Statutes at Large, be amended by inserting at the conclusion of section twenty-eight, chapter three, of said Act, the following:
>
> 'And provided further, That no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.' "

But defendant says this amendment is not applicable to it because it is not a railroad company, and, under the decision in the *Ellis* case, it is not a common carrier.

Plaintiff replies, first, that the term of the amendment are not confined to railroad companies or common carriers; and, secondly, it was clearly the purpose and intent of Congress to prevent removal of this class of litigation as an entirety and the courts will so construe it, though literally it may not be so all-embracing.

First. That the amendment is not limited to railroad companies or common carriers. We urge it also applies to other corporations engaged in and carrying on the business of a common carrier. And that defendant comes strictly within such classification. It is a corporation. It is not a railroad. But when (51-52 Transcript) it contracted with the "Katy" system to handle all interstate

fruit shipments originating on the latter's lines, furnish the refrigerator equipment in which to move same, furnish the ice, and the icing services, do the loading, stowing and bracing, and pay the damages arising out of the neglectful performance of such duties so assumed, it was to that extent engaged in and carrying on the business of a common carrier railroad corporation, the M. K. & T. Ry. Co. of Texas. It is for the neglectful performances of those duties plaintiff in this action seeks to hold it. And the removal of such an action is expressly prohibited by the Cummins amendment.

Secondly. In enacting this statute, it was clearly the intention and purpose of Congress to prohibit removal of this class of litigation and the courts will so construe it as to accomplish this purpose, and not defeat its object by subtle construction.

The Rector, etc., of Holy Trinity v. *U. S.*, 143 U. S. 457, 36 Law Ed. 226, holding that the object designed to be reached by the Act must limit and control the literal import of the terms and phrases employed:

> "Of course, this act, like other acts, may be read in the light of the purpose it was intended to subserve and the history of its origin."
>
> *United States* v. *L. & N. Rd. Co.*, 236 U. S. 318 at p. 333, 59 Law Ed. 598.

The history of the Cummins amendment is doubtless indicated in *McGoon* v. *Nor. Pac. Ry. Co.*, 204 Federal, 998.

> *Storm Lake Tub & Tank Factory* v. *M. & St. L. Ry. Co.*, 209 Federal 895.

> "These rules must be accommodated to the facts, and the great purpose of Congress effectuated as nearly as may be."
>
> *McDougal* v. *McKay*, 237 U. S. 372, at p. 385, 59 Law. ed. 1001.

> "The purpose of the act is to secure the purity of food and drugs, and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it."
>
> *U. S.* v. *Antikamnia Chemical Co.*, 231 U. S. 654, p. 665, 58 Law ed. 419.

"To permit this would be subversive of the purposes of the statute and a continuance of the system which the act was designed to change."

Rainey v. *W. R. Grace Co.*, 231 U. S. 703, p. 708, 58 Law ed. 445.

The Cummins amendment is remedial, and should be liberally construed.

Teel v. *C. & O. Ry. Co. of Virginia*, 204 Federal 918, C. C. A.

The trial judge indicated doubt as to the correctness of his ruling denying remand (Transcript 76), but held "where doubt exists the court is compelled * * * to overrule the motion to remand."

We understand the rule to be otherwise, and as stated in *Western Union Telegraph Co.* v. *L. & N. Rd. Co.*, 201 Federal 932, at p. 945:

"I am strengthened in this conclusion by the well settled rule growing in part out of the great practical hardship of protracted and fruitless litigation resulting to litigants from a ruling by a Federal trial court erroneously retaining jurisdiction of a removed cause, as contrasted with the finality of its judgment remanding the cause and restoring jurisdiction to the State Court (*Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, 570, 16 Sup. Ct. 389, 40 Law ed. 536), that if there be any substantial doubt as to Federal jurisdiction the cause should be remanded, and jurisdiction retained only where it is clear. Black's Dillon on Removal, Sec. 216, p. 356; *State of Kansas* v. *Bradley* (C. C.), 26 Fed. 289, 292 (Mr. Justice Brewer, then Circuit Judge); *Fitzgerald* v. *Ry. Co.* (C. C.), 45 Fed. 812, 820; *Hutcheson* v. *Bigbee* (C. C.), 56 Fed. 329; *Concord Coal Co.* v. *Haley* (C. C.), 76 Fed. 883, 884; *Crane Co.* v. *Guanica Centrale* (C. C.), 132 Fed. 713; *Tierney* v. *Ins. Co.* (C. C.), 163 Fed. 82, 86. The State Court will have undoubted jurisdiction of this litigation, and any rights which the defendants may have under the constitution and laws of the United States may be fully and properly protected, not only in the State Courts, but upon writ of error to the Supreme Court of the United States, in the event of final decision in the State Courts is adverse to the rights claimed by them."

POINT 3.

The action having originally been instituted against the Chicago, Burlington & Quincy Railroad Company and the American Refrigerator Transit Company charging joint tort (petition filed 1914, February 13, Transcript 10). And the parties having stipulated the causes should be tried upon the same evidence and record so far as applicable (22 Transcript). And the trial court, after trial upon the merits, over plaintiff's exceptions, dismissed the action as to the Chicago, Burlington and Quincy Railroad Company, but retained jurisdiction *in rem* in the attachment proceedings over the co-defendant, the American Refrigerator Transit Company (49 Transcript), such dismissal was in *invitum* so far as plaintiff was concerned; the suit did not thereupon become separable or removable, and the American Refrigerator Transit Company had no right thereafter to remove the suit as to it.

Kansas City Southern Ry. Co. v. *Herman*, 187 U. S. 63, 47 Law ed. 76.

The suit so removed was not a new suit. It was only the substituted petition filed 1916, October 16 (Transcript 51), under the order or judgment of the court recited in the last paragraph on the page preceding and which expressly retained jurisdiction of the attachment proceedings. And was filed in accordance with the provisions of the *Iowa Code, reading*:

> *Section* 3876. "The plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed."
>
> *Section* 3877. If it be subsequent to the commencement of the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto."

The separate petition had been filed and attachment levied 1916, August 31, previous to the judgment (Transcript 24). It was therefore filed during the progress of the main, original proceeding and part of same. And was only auxiliary thereto. Yet the same section of the statute above quoted provides it was independent. How it could be part of the original proceeding and auxiliary thereto and yet be independent thereof is so difficult a proposition we refrain from imposing its solution upon the court, by simply resting this point upon the proposition that the attachment proceedings were part of the original suit and not removable under doctrine of the case of *Kansas City Southern Ry. Co. v. Herman*, above cited.

As there are five other cases pending below between the same parties hereto (Transcript 21), in which there were no attachment proceedings and jurisdiction as to which is dependent upon points 1 and 2 hereinbefore presented, we would respectfully ask that consideration of the appeal be not confined to point 3 alone.

The distinction between writs of error and appeal is abolished by the Act of Congress approved 1916, September 6, c. 448, sec. 4.

We respectfully submit the court below was in error in overruling the motion to remand.

CHESTER W. WHITMORE,
Attorney for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

E. H. EMERY & COMPANY,
Plaintiff and Appellant,

VS.

AMERICAN REFRIGERATOR TRANSIT COMPANY,
Defendant and Appellee.

Law.
Term No. 739.
General No. 26206.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, OTTUMWA DIVISION.
HON. MARTIN J. WADE, DISTRICT JUDGE.

APPELLANT'S SUPPLEMENTAL BRIEF.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

In the advance sheets of *Northwestern Reporter, Volume* 166, *at p.* 600, just published, in the case of *E. H. Emery & Company* v. *Wabash Railroad Company, et al.*, the Supreme Court of Iowa has decided in favor of the same plaintiff herein a cause largely similar upon its facts, and containing the first construction by any court we have been able to find of the "auxiliary attachment" proceedings, *Sections 3876 and 3877 of the Iowa Code*, involved under *Point* 3 of *Appellant's Brief, p.* 21, herein.

That this court may have the benefit of that discussion we would beg leave to file this *Supplemental Brief*.

That case involved damages to shipments of strawberries under the same form of B/L. No formal claim in writing had been filed by the shipper with the carrier, but the shipper had called the attention of the agent of the delivering line to the damage before the freight was unloaded, the agent had examined the damaged shipments, and made notation on the freight bills as to the nature, cause and extent of the damage. The Supreme Court of Iowa held this sufficient. This establishes that Judge Vermilion was in error, under his opinion set out at length in the present appeal, in exonerating the delivering lines under a similar state of facts. In that case the refrigerator company was not a party to the action. But subsequent to the institution of the original suit the plaintiff sought to bring in the initial carrier, the St. Louis, Iron Mountain & Southern Railway Company, by attachments proceedings, under the same statutes (*Sections 3876 and 3877 of the Iowa Code*) involved herein.

On this phase of the case, the Supreme Court of Iowa, says, in paragraphs "(5-7; IV)" of the opinion, at p. 606 *of* 166 *Northwestern Reporter*:

> "The brief of appellant presents for our consideration questions pertaining to a garnishment proceeding. It appears that as to the fourth shipment the initial carrier was the St. Louis, Iron Mountain & Southern Railway Company. After suit was brought this company was by amendment made a party defendant, but no personal jurisdiction thereof was ever acquired. The plaintiff caused an attachment to issue against it and served the attachment by garnishment. The garnishees so summoned were the other defendants in the case. They were garnisheed as supposed debtors of the nonresident defendant. They answered as garnishees. Later, in response to an order of the court, they answered again. The plaintiff filed a pleading controverting the answers. It also filed a

motion to strike such answers, and a motion accompanied with a list of interrogatories calling for many details pertaining to the interline accounts of the defendant railway companies, with a view undoubtedly of uncovering, if possible, balances in favor of the attached defendant. Both the motion to strike and the motion requiring answers to these interrogatories were overruled by the trial court. Likewise the petition to require the garnishees to produce books of account and papers was overruled. These rulings are all complained of in argument. We do not think that the appellant is in any position to obtain on this appeal a review of such rulings. The garnishment was a part of the method of service of the attachment. The attachment proceeding is not a part of the main case except in a collateral sense. The statute expressly provides that proceedings relative to the attachment are to be deemed independent of the main case and only auxiliary thereto. *Code Sec. 3877.* If appellant's motions had been sustained, the issues arising on the answers of the garnishee and the controverting thereof would not be tried as a part of the issues in the main case. The answers of the garnishees did not show any indebtedness. On the face of the pleadings, therefore, jurisdiction was not acquired, even *in rem*, as against the Iron Mountain Road. Whether the garnishees were discharged at this time or not does not appear from the record. If not, the final entry of judgment against plaintiff would discharge the garnishment. *Harger* v. *Spofford*, 44 *Iowa*, 369. It was open to the plaintiff to save the pendency of the proceeding by a prompt appeal within two days, as provided by Code, Secs. 3931, 3932. A mere appeal from the judgment would not ordinarily be an appeal from the order discharging the garnishee. If it could be deemed such in this case, it would not avail the appellant at this point, because the appeal from the judgment was not taken within two days, as required by *Section* 3932. If the jurisdiction as to the Iron Mountain Road were not dependent upon the attachment proceeding, the plaintiff's right of appeal in the main case as to such defendant would be the same as to any other defendant, regardless of the attachment. *Munn* v. *Shanon*, 86 *Iowa*, 363, 53 *N. W.* 263. We must hold therefore that the rulings of the trial court pertaining to the garnishment proceedings are not before us for review on this appeal. It necessarily follows also that the jurisdiction *in rem* as to the St. Louis, Iron Mountain & Southern Railroad Company has been lost."

We submit that this discussion makes clear the application of *Iowa Code, Sec. 3877* that the attachment proceedings are to be deemed "independent" of the ordinary proceedings and only "auxiliary" thereto.

"Ordinary" proceedings mean law action (*Iowa Code*, 1897, *Section* 3431), as distinguished from equitable.

That if there be an issue in the attachment proceedings—if the answer of the garnishee be controverted, as in the *Wabash* case, *supra*—such issue would not be tried as a part of the main case, but be separately tried, as auxiliary thereto or independent thereof.

But where, as at bar, the garnishee defaults, and does not appear, and there is no answer of the garnishee to controvert, there is no issue in attachment. There is no issue to be tried apart, independent of, or as auxiliary to the main case. By default of the garnishee "he is presumed to be indebted to the defendant to the full amount of the plaintiff's demand," in the language of *Section* 3943 *of the Iowa Code*. Jurisdiction *in rem* of the defendant is thus and thereby conclusively acquired in the main, original case. The garnishee in the instant case has never been discharged. As between plaintiff and the defendant refrigerator company there never has been final entry of judgment discharging such defendant upon the merits. The State Court by its formal judgment entry expressly retained jurisdiction over the refrigerator company in the attachment proceedings.

At the time of the filing of the auxiliary petition in attachment, and at the time of the default of the garnishee, jurisdiction over the refrigerator company was not then dependent upon same, as it was already in court, had appeared, answered, and participated in the trial of the principal cause. It was only to keep it in court in the event the court dismissed as to the Burlington road that the attachment proceedings were resorted to.

As we understand, this all leads up to the conclusion that the original action was not removable, because the local defendant, the Chicago, Burlington & Quincy Railroad Company, a common carrier, prohibited by the *Cummins amendment* from removing, was joined. That when the State Court (erroneously it now appears) dismissed such defendant upon the merits, but retained jurisdiction over the refrigerator company in the attachment proceedings, this remaining phase of the controversy did not thereby become removable, under the doctrine of

Kansas City Southern Ry. Co. v. *Herman*, 187 *U. S.* 63, 47 *Law ed.* 76.

That the garnishee having defaulted, and there being no issue to try in the attachment proceedings for such reason, there was nothing "independent" of or "auxiliary" to the main suit requiring a separate issue and upon which removing proceedings could be based.

What is the controversy or issue? The claim for damages against each of the defendants. Was there any issue or controversy in the attachment proceedings, requiring a trial, hearing or determination "independent" of or "auxiliary" to such main suit? No. The principal controversy was between plaintiff and the C. B. & Q. Rd. Co. and the A. R. T. Co. The garnishment proceedings were between plaintiff and the garnishee, and "auxiliary" to and "independent" of such main isssue. In the attachment-garnishment proceedings the garnishee defaulted, and order of the State Court was so entered of record and still stands, leaving no issue to be tried or determined therein, leaving nothing "auxiliary" to or "independent" of the main proceeding. The State Court ac-

quired jurisdiction of the subject matter when the first petition was filed February 13, 1914. It acquired jurisdiction of the A. R. T. Co. when notice was served upon it January 31, 1914, as established by the answer it filed December 1, 1914. The only purpose of the attachment proceedings was to retain jurisdiction of the A. R. T. Co. in the event the C. B. & Q. Rd. Co. was dismissed, and that jurisdiction related back to the main case, under *Iowa Code, Sec.* 3876, quoted at p. 6 of Appellant's Brief. As between plaintiff and the garnishee there was no issue upon the auxiliary petition in attachment, as the garnishee defaulted, leaving only the main issue upon the merits as between plaintiff and the refrigerator company, bringing the situation clearly within the doctrine of the *Herman* case, *supra.*

The fact that plaintiff alleged the contract between the refrigerator company and the M. K. & T. Ry. Co., and alleged the contract between plaintiff and such railway company comprised by the B/L, did not change the proceeding from one *ex delicto* to one *ex contractu.*

Owens Brothers v. *C. R. I. & P. Ry. Co.*, 139 *Iowa*, 538, *at p.* 543, and cases cited.

The United States District Judge in his opinion overruling the motion to remand intimated that at trial, should it be established the action was in tort, he might then remand it. We understand the jurisdiction of the Federal courts is to be tested by the allegations in plaintiff's petition (see cases cited at p. 13 of Appellant's Brief), and not to be determined by what the trial may develop, especially where, as in this instance, it was not removable because of the presence of a joint defendant.

We respectfully submit that upon each of Points 1, 2 and 3 of Appellant's Brief there should be reversal with order to remand.

Respectfully submitted,

CHESTER W. WHITMORE,
Attorney for Plaintiff and Appellant.

REPLY BRIEF.

Replying to the brief filed on behalf of appellee, we beg to call attention to the fact that none of the cases cited at page 4, Point 1, as to a federal question being involved are in point. All of the cited cases relate to those in which interstate common carriers, subject to the act to regulate Congress, were parties.

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434, 59 Law Ed. 1036, as we understand it establishes that car line companies, such as appellee herein, are not common carriers and not subject to the act to regulate commerce.

To the extent that appellee was a partner with the M. K. & T. Co. of Texas, as to handling the perishable freight traffic in question, and to the extent it assumed the duties of such railway company as common carrier issuing its B/L to cover the shipments in question, it would seem certainly that to such extent appellee was engaged in and carrying on the business of a common carrier, and by the Cummins amendment prohibited from removing an action of the nature involved.

As to Point 3, page 4, appellee cites cases bearing on the question of separable controversy, where both diversity of citizenship and the requisite amount in controversy were involved, or where one of the parties was a common carrier, subject to the act to regulate commerce, and the application of the Cummins amendment was not invoked. An action, such as this, charging joint and concurrent negligence is not separable, as decided by a familiar line of cases in this court.

More nearly in point we think is the case of *Little York Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 24 Law Ed. 656, relating to a bill in equity seeking to enjoin defendant from washing silt from its hydraulic gold mining claim down onto plaintiff's agricultural land on Bear River.

Defendant removed the cause from the state to the Federal Court under allegation it claimed title under laws of the United States. A motion to remand was sustained, this court saying in part:

> "A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

Quoted with approval in *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 44 Law Ed. 864.

We do not find in appellee's brief reference to any federal law regulating commerce and affecting it, or upon which it can rely, or claims to rely. It makes no claim to the benefit of the terms of the B/L requiring claims for damage to be filed in writing within four months; it makes no claim to any limitation of value or liability; it cites no case tending to show that as a stranger to the interstate commerce act, to the tariffs and classifications, and to the B/L involved, it can invoke any provision thereof.

CHESTER W. WHITMORE,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

LAW.
TERM NO. 739.
GENERAL NO. 26206.

E. H. EMERY & COMPANY, *Plaintiff and Appellant,*

vs.

AMERICAN REFRIGERATOR TRANSIT COMPANY, *Defendant and Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, OTTUMWA DIVISION.

HON. MARTIN J. WADE, DISTRICT JUDGE.

APPELLEE'S BRIEF.

STATEMENT OF THE FACTS AND ISSUES INVOLVED.

Believing that appellant's statement of facts might well be abbreviated and some minor details thereof corrected or clarified, we submit the following statement of facts, some paragraphs of which we have adopted verbatim from appellant's statement.

Plaintiff and appellant, E. H. Emery & Company, is a partnership, composed of E. H. Emery and W. W. Copeland. Its principal place of business is located at Ottumwa, Iowa. Both partners are citizens of the State of Iowa. The firm is engaged in the wholesale fruit business.

The defendant, American Refrigerator Transit Company is a corporation organized and existing under the laws of the State of New Jersey (Transcript 19). For brevity it will hereafter be designated as the "refrigerator company."

The matter in controversy is the principal sum of $618.25 (Transcript 58-59). This amount appellant claims as dam-

ages sustained to eight carloads of fresh peaches shipped by plaintiff from various Texas points in 1912, to plaintiff at various Iowa points.

Suit was instituted by plaintiff against the delivering carrier, the Chicago, Burlington and Quincy Railroad Company, in the District Court of the State of Iowa, in and for Wapello County, as State Court No. 9643. Ottumwa is the county seat of that county. The original petition filed in the State Court, 1914, February 13, appears as document No. 7, printed page 10 of the Transcript of Record herein.

The M. K. & T. Ry. Co. was the initial carrier but was not joined as a party defendant.

In the action in the State Court, the refrigerator company was joined, and appeared as a defendant, service of notice of suit upon it being had in Linn County, Iowa.

The petition charged that the refrigerator company was a common carrier (Transcript, p. 10, Par. 4), and it was joined as defendant under allegations that it was a joint tort feasor.

The original petition also contained numerous allegations which need not be considered here as plaintiff's theory of its cause of action was largely modified and amplified by the allegations of the so-called "Substituted Auxiliary Petition in Attachment" (Transcript, p. 51), on which this proceeding is based.

The case was tried in the state court October 4th to 16th, 1915, at which latter date it was fully submitted and taken under advisement by the court. No further action was taken by either party and on August 9, 1916, Judge Vermilion, who tried the case, filed his opinion with findings of fact (Transcript 26) exonerating the C. B. & Q. R. R. Co. on account of plaintiff's failure to file notice of claim as required by the bill of lading and holding the case open for further proceedings by the defendant Refrigerator Company before formal judgment entry.

Thereafter, on August 31, 1916, plaintiff filed a so-called "Auxiliary Petition in Attachment" (Transcript 24) against the defendant refrigerator company, and a writ of attachment was duly served by garnishing the C. B. & Q. R. R. Co., as a supposed debtor of the defendant company. This so-called "Auxiliary Petition in Attachment" contains no allegations constituting a cause of action and asks for no final relief. It simply sets out the facts on which plaintiff claims the attachment and asks that the writ issue. The C. B. & Q. R. R. Co. was garnished thereunder and defaulted for failure to appear or answer to the garnishment.

Thereafter, on September 7, 1916, the defendant Refrigerator Company moved to dismiss the case because brought in the wrong county under the Iowa statutes (Transcript 44). This motion was duly sustained, the court holding that the

Refrigerator Company was not properly sued in Wapello County in the first instance and that the suit, having failed as to the co-defendant C. B. & Q. R. R. Co., must under the Iowa statute, be dismissed as to the Refrigerator Company. (Transcript, p. 48.)

The final judgment of the court filed October 16, 1916, adjudicated the controversy in favor of the C. B. & Q. R. R. Co. on the merits and dismissed the case as to the Refrigerator Company at the cost of the plaintiff, with compensation for its expense in attending in the wrong county. The court, however, retained jurisdiction of the defendant Refrigerator Company under the attachment and allowed plaintiff to file a new petition in support of the attachment, which plaintiff took advantage of by filing the so-called "Substituted Auxiliary Petition in Attachment" (Transcript 51), in which the Refrigerator Company is the sole defendant, and in which the cause of action is stated in six different counts, plaintiff thereby abandoning, in part, at least, his original theory of the Refrigerator Company's liability and adopting and urging several new theories.

The Refrigerator Company thereupon, before the date when it was required to appear or answer, filed its petition for removal of said case to the District Court of the United States on the ground that:

> "Said suit is a suit and proceeding of civil nature arising under a federal law regulating interstate commerce and is not a suit or proceeding exclusive jurisdiction of which has been conferred upon the Commerce Court, and this petitioner, the American Refrigerator Transit Company, defendant in said suit, is not a railroad company or other corporation or person engaged in or carrying on the business of a common carrier" (Transcript 66).

Which petition was accompanied by proper bond and notice of removal.

Whereupon the state court, over plaintiff's exception, 1916, November 16, granted the removal (Transcript 69.)

A transcript from the state court of the proceedings hereinbefore indicated was filed in the United States District Court, 1916, November 29 (Transcript 71). Plaintiff filed his motion to remand (Transcript 71) and defendant filed a motion to separate into counts (Transcript 80). The motion to remand was overruled, whereupon defendant's motion to separate into counts was argued by both sides and sustained by the court, both rulings appearing in the same order (Transcript 79). Plaintiff later filed a motion to reconsider the ruling on the motion to remand (Transcript 77) which was duly overruled (Transcript 79).

Whereupon plaintiff elected to stand upon its motion to remand, denied jurisdiction of the United States Court, and refused to proceed further (Transcript 4 and 5).

The District Court consequently dismissed the case and entered judgment against plaintiff for costs and granted an appeal direct to the Supreme Court of the United States, which appeal is here pending.

The question involved in this appeal is appellant's right to have this case remanded to the District Court of Wapello County, Iowa.

BRIEF.

Point 1.

Plaintiff's petition alleges:

a. Defendant expressly assumed the liability of the M. K. & T. Ry. Co. under the Interstate Commerce Act;

b. That defendant violated the provisions of the tariff and failed in its duty thereunder;

c. That the defendant and the M. K. & T. Railway Co. of Texas were partners in handling the traffic in question;

d. That the defendant assumed all the obligations of the railway company under the interstate bill of lading;

e. That defendant is liable for all damage whether it occurred on the lines of the initial carrier or elsewhere;

Plaintiff's petition is dealing entirely with interstate shipments of freight, so it is clear that these allegations present a cause of action based on the laws of the United States and necessarily involve the construction of the Interstate Commerce Act.

McGoon vs. Northern Pacific, 214 Fed., 998;
Smith vs. A., T. & S. F., 210 Fed., 988;
Alabama G. S. Ry. Co. vs. The American Cotton Oil Co., 229 Fed., 11.

Point 2.

The removal is not prohibited by the Cummins' amendment.

Point 3.

Plaintiff's original petition having been dismissed as to both defendants, there was nothing left of his original case. Moreover, his new petition raised a number of Federal questions not involved in the original case and in some respects was based on theories entirely opposite to those originally advanced by him. The petition for removal was filed before de-

fendant was required to appear to and answer this petition and was therefore in time.

Powers vs. Chesapeake & Ohio, 169 U. S. 192; 42 L. Ed. 673;

Remington vs. Central Pacific, 198 U. S., 95; 49 L. Ed. 959;

Fritzlen vs. Boatmen's Bank, 212 U. S., 364; 53 L. Ed. 551.

ARGUMENT.

Point 1.

Early in his argument on this proposition appellant makes the following statement:

> "The right to remove is to be governed, not by what defendant avers, but upon the allegation of plaintiff's petition",

and cites authorities in support of it. This will be conceded to be the general rule and it is perhaps especially applicable to this case where defendant's petition for removal and the opinion of the lower court are both based entirely upon the allegations of plaintiff's petition.

Plaintiff has alleged that defendant was not a party to any of the governing tariffs (Substituted Petition, Par. 9, Tran. 53) but that the aforesaid Katy Line (M., K. & T. Ry. Co.) was a party to the same. In this division of his petition, plaintiff sets out and construes various provisions of the tariffs.

In paragraph 18 (Tran. 54) he alleges:

> "18. By the aforesaid tariffs the 'Katy' system obligated itself for the freight and refrigeration charges specified, to haul the cars to destination, under its B-L and the Carmack Amendment to the Interstate Commerce Act; and to 'furnish material and labor as provided for in said Tariff' as heretofore recited, the material and labor recited meaning the lumber and labor for stowing, and the ice and labor for refrigeration."

Later, in paragraph 24 (Tran. 56), we find that defendant incurred liability

> "by not reicing said cars when the bunkers got below one-half full as required by said tariff."

Later, under his second count, or theory (Trans. 59) plaintiff alleges:

"Defendant expressly assumed the liability of the 'Katy' system. That said system, as the initial carrier, under the Interstate Commerce Act, was liable for such damages, whether occurring on its own line or that of a connecting or delivering carrier, or through the fault of defendant; and by virtue of such assumption of liability by defendant plaintiff has the same right of action against it as it would have against said M. K. & T. Ry. Co. of Texas."

In his third theory or count (Tran. 60), plaintiff claims:

"The said refrigerator car company defendant and M., K & T. Ry. Co. of Texas were partners in the handling of the traffic in question."

In his fourth count (Tran. 60 *et seq.*), which he labels "Estoppel", plaintiff has, in practical effect, pleaded a waiver of the terms of the bill of lading. Can these provisions be waived?

In his fifth theory or count (Tran. 63), we find the following as the basis of defendant's liability:

"When it permitted the bunkers to run below half full contrary to the tariff provisions".

In his sixth theory or count plaintiff states:

"The act to regulate commerce in section 1 defined 'transportation' as including cars and all services in connection with the refrigeration or icing of property transported and made it the duty of the carriers subject thereto to furnish such transportation. Defendant was not, as the owner, lessee or lessor of refrigerator cars subject to said act. The Katy system, however, was subject to said act and submitted thereto by filing its aforesaid tariffs with the interstate commerce commission. THE DUTIES THUS IMPOSED BY LAW UPON SAID KATY SYSTEM, THE DEFENDANT, to the extent of furnishing the refrigerator cars, the ice and icing therefore, and the material and labor for stowing, ASSUMED * * * and thereby became charged with a public duty * * * and for its failure in these respects is directly answerable to plaintiff."

Under these allegations, we believe, as Judge Wade stated in his opinion, that there can be absolutely no doubt that the case arises under the laws of the United States.

Judge Wade has further stated in language which we can not improve:

> "Now this being an interstate shipment, and the plaintiff insisting that the defendant is liable, not only for the damage occurring upon the M., K. & T. Railway, with which defendant was under contractual relations, but also that it is liable for damages upon the lines of connecting carriers, where does it find the law establishing such liability? Clearly not in the common law, and certainly not, in any state legislation. The plaintiff must rely upon the Carmack amendment which alone creates a liability upon the initial carrier for the negligence of all connecting carriers. Therefore, the plaintiff specifically pleads a cause of action arising under an Act of Congress, and of every such cause of action, this court has jurisdiction. The bill of lading upon which the plaintiff relies, is one for interstate shipment —the construction of which, and the legality of which, are governed by Acts of Congress, and not by the common law, or state law. So that there can be no question but that, aside from the question of amount in controversy, this case is within the jurisdiction of this court as an original action, or upon removal." (Tran. 74.)

That these allegations in the petition and appellant's theory of his cause of action involve Federal questions and give a right to removal, we cite *McGoon vs. The Northern Pacific*, 204 Fed., 998; *Smith vs. A., T. & S. F.*, 210 Fed., 988; *Alabama G. S. Ry. Co. vs. American Cotton Oil Co.*, 229 Fed., 11.

We do not consider any of the cases cited by appellant under this proposition as being in point or even as reflecting any light upon the single question of law involved on this appeal. In so far as they have any bearing upon the controversy between plaintiff and defendant in this case, they relate to purely collateral issues not here involved. We do, however, consider it somewhat significant that the decisions which appellant so cites are all from the courts of the United States, in view of his earnest disclaimer that any Federal questions are involved.

Appellant urges the proposition that the defendant may not invoke the provisions of the bill of lading in its defense and thus raise a federal question. We desire to call the attention of the court to the fact that defendant's right to removal is in no manner predicated upon any such proposition, nor is such an issue in any manner involved in this appeal. Defendant has filed neither answer nor demurrer and bases its theory of the removability of this case entirely upon the allegations of plaintiff's petition, in which plaintiff seeks to impose a lia-

bility upon the defendant through the provisions of the Interstate Commerce Act, the governing tariffs and the Interstate bill of lading, all of which must be interpreted in either granting or denying the relief demanded by plaintiff.

Point 2.

The Cummins' Amendment provides:

> "No suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended, etc., shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000."

Appellant insists that this prohibits the removel of this case because although defendant was not a common carrier, not subject to the Act of Congress and not a party to the bills of lading, it was, nevertheless, a person engaged in and carrying on the business of a common carrier and within the purview of the statute. There seems to be no authority directly in point on this subject.

Appellant insists that this language should be given a liberal construction, but, as Judge Wade says, even a liberal construction can hardly bring the case within the language used, which is very specific. The limitation "engaged in, and carrying on the business of a common carrier", is specific. The language "received for transportation by such common carrier, under Section twenty of the Act", is more specific. The defendant did not receive this property in any sense, and not being a carrier, it could not be held to have received it "under Section twenty of the Act to regulate commerce."

Moreover, this case and this defendant are within neither the letter nor spirit of this law. Congress intended to prevent carriers from removing small damage claims arising from interstate shipments, taking into consideration that there would be many such suits and that the rules of law applicable thereto would in a short time become well settled, if not already so. Congress never intended to give this plaintiff an opportunity to sue a person other than the carrier for damage to his freight upon the theory that such person had assumed the obligations imposed upon such carrier by the Interstate Commerce Act, tariffs and bills of lading, but was not entitled to

the benefit of their provisions, and then insist that a state court should determine what are the obligations imposed by the Act and against what persons other than carriers these obligations may be enforced. The questions that Congress intended should be submitted to the state courts are those that are ordinary, well settled and of frequent occurrence, not those which are novel, perplexing and without precedent.

We believe that the language of the statute itself casts considerable light upon this proposition. The Act applies to railroad companies and other corporations or persons engaged in and carrying on the business of a common carrier. This means railroad companies and other common carriers; for a common carrier is a "person or corporation who is engaged in or carrying on the business of a common carrier" and a person or a corporation who is carrying on the business of a common carrier is a common carrier. To hold otherwise is not only to juggle with words but to ignore the fundamental principles of law which define the essential characteristics of a common carrier. The latter part of this section casts further light on the matter in referring to "property received for transportation by such common carrier under section 20 of the Act to regulate commerce". What is such common carrier and what is the antecedent of "such"? Obviously the language in the preceding clause—a railroad company or other person or corporation engaged in or carrying on the business of a common carrier. Indeed how can any other than "such common carrier" receive property for transportation under section 20 of the Act to regulate commerce?

Moreover, the language "such common carrier" unmistakably refers to the persons or classes of persons who may be defendants in the suits which cannot be removed.

It is then only actions against "such common carriers" on account of damages to "property received for transportation by such common carriers under section 20 of the Act to regulate commerce", which "such common carriers", as defendants, are forbidden to remove.

Appellant not only pleads and argues but cites the case of *Ellis vs. Interstate Commerce Commission*, 237 U. S., 434, to prove that appellee is not a common carrier.

Clearly on appellant's own theory, the Cummins' amendment does not apply to this defendant, and the removal of this suit is not thereby prohibited.

Point 3.

At this point, we believe it would be well, even at the risk of repetition, to give a brief synopsis or explanation of the situation in the state court at the time the petition for removal was filed. The Iowa statutes require that a defendant be sued

in the county of his residence (Code, Sec. 3501) subject to certain exceptions not here material, but provide that two or more joint defendants may be sued in the county of the residence of either of them. (Code, Sec. 3501.)

This suit was brought against the C., B. & Q. R. R. Co. and the A. R. T. Co. in Wapello County, Iowa. For the purposes of this case, the defendant railroad was a resident of Wapello County and the defendant refrigerator company of Linn County, Iowa.

The statutes further provided that if in such a suit the resident defendant secures a favorable judgment or a voluntary dismissal, the non resident defendant may have the proceedings dismissed as to him without prejudice and with reasonable compensation for attending the trial in the wrong county, (Code, Sec. 3502); this, on the theory that he should have been sued in the county of his residence and that plaintiff cannot require him to defend the case in another county by the expedient of joining as co-defendant a person who is not liable in the action.

After the trial of this cause, the District Court of Wapello County, Iowa, filed an opinion holding that the defendant railroad was not liable and giving the defendant refrigerator company opportunity to file a motion for dismissal on the above ground (Transcript, Doc. 11, p. 38). The plaintiff thereupon attempted to take advantage of a provision of the Code of Iowa which allows suit to be brought against a foreign corporation in any county where property belonging to it may be attached (Code, Sec. 3495), by filing an auxiliary petition in attachment (Transcript 24) and having a writ of attachment served thereunder. The defendant refrigerator company filed a motion to dismiss on the ground that it was a non-resident of Wapello county and that judgment had been rendered in favor of the resident co-defendant. (Transcript 44.) This motion the court sustained, holding that the attachment could not determine the venue for a trial already had. (Transcript 48.)

The court did, however, in its final judgment (Transcript 49-50) retain jurisdiction of the attachment proceedings and of the defaulted garnishee thereunder, and gave plaintiff leave to file a new petition in support thereof.

We do not understand and therefore will not attempt to explain the action of the court in retaining jurisdiction of the attachment which was not based upon any pending cause of action nor connected with any prayer for relief. The judgment of the court however, shows (Transcript 49) that it considered the attachment as a proceeding *in rem* separate from the original personal action which was dismissed. Plaintiff thereafter filed his substituted petition modifying his theory

of his cause of action almost beyond recognition and containing the allegations which are the basis of this removal.

Plaintiff insists that this is not a new case. The original suit was dismissed as to both defendants which left nothing of plaintiff's original case. The first was a personal action. This, appellant denominates an action *in rem*. His original petition was against two defendants. His substituted petition is against only one. Plaintiff served a new original notice which is the method prescribed by the Iowa statutes for commencing a civil action. (Code, Sec. 3514.) The original petition contained only one theory and alleged that the defendant refrigerator company was a common carrier. The new petition contains six different theories and expressly alleges that the defendant is not a common carrier.

The case which was removed meets every test of a new case; new notice, new petition, new cause of action, newly injected Federal questions, and appellee's right of removal is on the same basis as though plaintiff's substituted petition were the first pleading filed.

Appellee's right to removal, however, does not depend upon this question. It is well settled that a case though not originally removable may become so.

> *Powers vs. Chesapeake & Ohio R. R. Co.*, 169 U. S., 92; 42 L. Ed. 673.

This case was not originally removable. Both defendants were originally sued as common carriers, and were prohibited from removing by the Cummins' amendment. Thereafter the case was dismissed as to both defendants and plaintiff filed a new petition against appellee alone alleging that appellee was not a common carrier.

This case differs in several respects from *Kansas City Suburban Belt Ry. Co. vs. Herman*, 187 U. S., 63, 47 L. Ed. 76, cited by appellant.

In that case the right to removal was predicated upon the action of the court in entering judgment over plaintiff's objection, in favor of the resident defendant only. In this case judgment was rendered in favor of both defendants and the right of removal is based upon the voluntary action of plaintiff in filing a new petition, which stated a new cause of action and brought the case within the removal statutes. In the *Herman* case the right of removal was claimed during the progress of the trial; here the case had been fully submitted, dismissed as to both defendants and a new petition filed stating a new cause of action.

More closely in point is the case of *Fritzlen vs. Boatmen's Bank*, 212 U. S., 364, 53 L. Ed 551, which was originally not a removable case and in which it was held that the petition for removal filed after additional pleadings disclosed a remov-

able controversy was in time and that the removal was properly granted.

We believe the following language from *Remington vs. Central Pacific Railroad Co.*, 198 U. S., 95, 45 L. Ed. 959, at page 962, "it is a sufficient reply to the motion and to the objection to the removal that the petition was filed as soon as the case became a removable one" is applicable to and governs the present case.

SUMMARY.

In conclusion we submit that plaintiff's original case in the state court was never removable at any time prior to the judgment dismissing his petition as to both defendants. It became removable when plaintiff by his own voluntary act filed his new petition stating a cause of action based upon rights granted and liabilities imposed by laws of the United States. Appellee, not being a common carrier, is not within the prohibition of the Cummins' amendment, and the petition for removal was filed as soon as the suit became a removable controversy.

Wherefore we respectfully submit that the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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